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SALE  
UNDER  
PARTITION ACT,  
1868.

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THE  
COMPULSORY SALE

OF

REAL ESTATE

UNDER THE POWERS OF

THE PARTITION ACT, 1868,

AS AMENDED BY

THE PARTITION ACT, 1876.

BY

PHILIP HENRY LAWRENCE,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.



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THE  
PARTITION ACT, 1868.

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INTRODUCTION.

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THIS Act relates to land held by two or more persons as coparceners, tenants in common or joint tenants; and the chief object of the enactment is not partition, which means the division of the property in specie, but its conversion by sale, and a division of the proceeds of sale amongst the several persons entitled.

The title of the act, though at first sight it may be considered inapplicable, is nevertheless strictly to be justified; for the court is only authorized to make the requisite order for sale in an action FOR PARTITION. Moreover, sections 9 to 12 relate not only to those cases where a sale is sought, but to partition actions proper, and are in fact equally serviceable in both classes of actions.

### *State of the Law before 1868.*

---

Partition at  
common law.

At common law partition could only be compelled between parceners; but by the statutes of 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, the right to claim a partition was given to every tenant in common or joint tenant of manors, lands, tenements, and hereditaments.

By statute 31  
Hen. 8, c. 1.

The first of those acts recited several of the inconveniences of enforced partnership (a) in land, stating that none of the owners knew their several portions, and could not by the laws of the realm otherwise occupy or take the profits of the same, or make any severance, division, or partition thereof, without either of their mutual assents and consents, by reason whereof divers and many of them, being so jointly and undividedly seised of manors, lands, tenements, and

---

(a) The word "partnership" is here used in its general and not its technical sense, as defined by Mr. Justice Lindley in his *Treatise on Partnership*, according to which definition the term would hardly apply, for he limits its use to cases where relation has arisen through mutual agreement, and applies the doctrine of agency to all its dealings: whereas in our case of enforced joint ownership, there has been no mutual agreement at the commencement of the relation; nevertheless, it is possible that it is strictly entitled to be called a partnership, for each owner has an undivided part of the whole, and is accountable to his co-owners for rents and profits received beyond his just share.

hereditaments, oftentimes of their perverse, covetous, and malicious minds and wills, against all right, justice, equity, and good conscience, by strength and power not only cut and fallen down all the woods and trees growing upon the same, but also have extirped, subverted, pulled down and destroyed all the houses, edifices and buildings, meadows, pastures, commons, and the whole commodities of the same, and have taken and converted them to their own uses and behoofs, to the open wrong and disherison, and against the minds and wills of other holding the same manors, lands, tenements, and hereditaments jointly or in common with them, and they have been always without assured remedy for the same. The statute then enacted that all joint tenants and tenants in common of any estate or estates of inheritance in their own rights or in right of their wives of any manors, lands, tenements or hereditaments in England or Wales, shall and may be coacted and compelled to make partition between them by writ *de participatione faciendâ*, in like manner and form as co-parceners by the common laws of this realm have been and are compellable to do.

The statute of 32 Hen. 8, c. 32, after reciting <sup>32 Hen. 8, c. 32.</sup> that the last-mentioned statute did not extend to joint tenants and tenants in common for term of life or years, neither to joint tenants nor tenants in common where one or some of them have but

a particular estate for term of life or years, and the other have estate or estates of inheritance, enacts that in all such cases partition shall be compellable in like manner as if each held an estate of inheritance.

8 & 9 Will. 3;  
8 & 4 Anne, c.  
18.

The statute of 8 & 9 Will. 3, made perpetual by 3 & 4 Anne, c. 18 (and now repealed by the Statute Law Revision Act, 1867), was directed to facilitating the proceedings on writs of partition; and the Court of Chancery had assumed jurisdiction in cases of partition, greatly improving and practically superseding the practice which had obtained at law, but no attempts were made by the legislature fully to grapple with and redress the grievances arising out of enforced partnership in landed property until the year 1868, when the present Lord Chancellor introduced into parliament the bill for the Act of 1868, which is the subject of the present Treatise.

Evils to be  
remedied.

The evils to be remedied were not imaginary, for numberless instances were constantly occurring of properties which, either from their nature were indivisible into portions, such as a single house or a mine, or where the parties interested as owners were so numerous that the proportions of each if divided would be so small as to be valueless.

Absent parties,  
&c.

If, then, in such cases, some of the part owners were absent or under disability, there was no means of joint action to repair or lease the pro-



perty, and it frequently lapsed into a ruinous condition.

We need only refer to the well-known case of *Turner v. Morgan* (b), where Lord Eldon pronounced a decree for the partition of a house amongst three persons, and the commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase in the house, and all the conveniences in the yard. The defendant excepted to this award, but the chancellor overruled the exception, saying that he did not know how to make a better partition for the parties. He had granted the commission with great reluctance, but was bound by authorities, and it must be a strong case to induce the court to interfere, as the parties might agree to buy and sell.

Case of a single house.

The case of a mine is another instance of property which it may be physically impossible to divide between even a small number of owners, but in which very numerous owners are frequently interested as tenants in common or as joint tenants.

Mine.

Most real property lawyers were familiar with many cases in their own experience where, on account of the number of owners, dealings with property have been expensive, difficult or altogether impracticable.

Number of owners.

---

(b) 8 Ves. jun. 143; 11 Ves. jun. 157.

Court had no power to order a sale.

Devise in case of infants, &c.

Persons refusing assent.

The Court of Chancery had previously to the act no power to decree a sale instead of a partition, except by consent of all parties; and although, in the case of infants and persons under disability, the court sometimes surmounted the difficulty by the artifice of charging their costs on their shares, and then directing a sale for payment of costs; yet this device, even if successful, could hardly satisfy the dignity of the law, and the late Lord Justice Turner had doubts whether a title depending on a decree made on such grounds would be good if contested by an unwilling purchaser.

As to persons who obstinately refused to consent, no power existed to compel them however "perverse, covetous and malicious" they might be, to use the language of the statute of Henry. The author knew an instance where such a person (being himself not in want), but whose brothers and sisters were dependent for their maintenance on his concurrence in a sale or lease of their joint property, deliberately went to sea, knowing that, in the then state of the law, no dealings with the property could take place in his absence or without his consent. We may reasonably assume that the legislature had such cases as this in its contemplation, and that one object of the Partition Act of 1868 was to remove from an obstinate person the power to defeat the just claims of his co-owners.

These evils were long borne out of respect to the rights of private property, the law not treating tenancy in common as an ordinary partnership, and tenderly refraining from compelling an owner to sell his property against his will.

The time had, however, arrived when the injustice on the other hand of condemning an owner to perpetual exclusion from the fair fruits of his property came to be considered greater than that of compulsory sale to the co-owners.

Legislation in  
1868.

The present Chancellor (as we have already stated) in the year 1868 introduced a bill into parliament, which subsequently became law, to give power to the court to enforce a sale of landed property at the instance of one or more out of several co-owners of the estate.

Lord Chan-  
cellor Cairns.

This act, which is the 31 & 32 Vict. c. 40, and is entitled "An Act to amend the Law of Partition," has been no dead letter; for the session in which it passed was not over before it was put into practice, and during the eight years which have since elapsed the cases under it have been very numerous, much more so than cases for partition during that period, proving how great was the need of such a measure.

Partition Act,  
1868.

The French civil code contains a similar provision tersely expressed, "If the immoveables cannot be commodiously divided, a sale by auction must be proceeded in before the court. Nevertheless the parties, if all of age, may consent

French code.

that the auction should be made before a notary, on the choice of whom they can agree" (b).

Protection to  
heirs of in-  
fants.

One objection a long time made to this increase of the jurisdiction of the court in England in the case of infants and other persons under disability, viz., that their property might be converted from realty into personalty to the prejudice of their heirs, is removed by the 8th section of the act, which incorporates a provision from the Settled Estates Act, preserving the quality of real estate for the proceeds of sale (c).

Partition Act,  
1876.

The Supplemental Act of 1876 in no way alters the principle of the original act, but is directed to points of practice in order to facilitate its operation. Its provisions are explained hereafter; see especially pages 25 and 65, *post*.

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(b) See, as to the mode of application of this law, the case of *Bogaja v. Camilleri*, L. R., 3 Priv. Coun. Cas. 258.

(c) Vide p. 90, *post*.

### *Jurisdiction.*

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THE old mode of proceeding in cases of partition was at common law by writ of partition directed to the sheriff. Procedure at  
common law.

Courts of equity very early exercised a concurrent jurisdiction, the origin of which is somewhat obscure, but its convenience was universally acknowledged. The court directed a commission to issue, after ascertaining the interests of the parties, and that all proper persons were before the court. Lord Loughborough, Chancellor, remarked (a): "It is evident that the commission is much more convenient than the writ, the valuation of the proportions are much more considered, the interests of all the parties are much better attended to, and it is a work carried on for the common benefit of both." Accordingly the old common law procedure, although amended by statute (b), fell into disuse, and was finally abolished in the year 1833 (c). In Chancery.

The Partition Act, 1868, sect. 2, gives jurisdiction to the Courts of Chancery in England Court.

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(a) *Calmady v. Calmady*, 2 Ves. jun. 568.

(b) 8 & 9 Will. 3, c. 31.

(c) 3 & 4 Will. 4, c. 27, s. 36.



and Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster within their respective jurisdictions.

Judicature  
Act.

The Supreme Court of Judicature Act, 1873, enacts (*sect. 34, subsect. 2*), that all causes and matters commenced under any act by which exclusive jurisdiction has been given to the Court of Chancery shall be assigned to the Chancery Division of the High Court; and (*subsect. 3*) that all causes and matters for the partition or sale of real estates shall be assigned to the same division, so that by two express enactments the jurisdiction is now assigned to the Chancery Division of the High Court, subject, of course, to alteration by future rules of Court or orders of transfer; or to the discretion of a judge in any special case under *sect. 11* of the Judicature Act, 1875, subs. 2.

County court.

The county courts are given jurisdiction in cases where the property in question does not exceed the value of 500*l.*, and are to exercise the power and authority of the Court of Chancery in suits for partition in those cases (*a*).

It will be difficult in some cases to ascertain beforehand that the value of the property exceeds the limit above mentioned. In such cases the suit may proceed in the county court until

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(*a*) Sect. 12 of Partition Act, 1868.

the excess of value is discovered and proved, when it will be the duty of the judge, under the 9th section of the County Court Act, 1865, to transfer the suit to the High Court. If, however, the excess of value is known to the plaintiff before suit, it is improper in him to commence it in the county court, and if the value appear on the face of the plaint, the county court judge will dismiss the suit under the 14th section of the County Courts Act, 1867 (*d*).

But if the excess of value is not made to appear to the court until after the suit is *in progress*, the orders made previously to the discovery of the fact of such excess are not invalidated. [Sect. 9, County Courts Act, 1865.]

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(*d*) *Birks v. Silverwood*, L. R., 14 Eq. 101; *Thomson v. Flinn*, L. R., 17 Eq. 415.

### *Nature of Suit.*

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Must be an  
action for  
partition.

THE suit, or action, as it is now called, must be an action for partition, although it is no longer necessary to pray for a partition (*a*).

An action for partition is an administrative rather than a contentious proceeding, and formerly it was not proper to import into it disputed questions of title, or to try the right to possession of the property, which is the subject of the suit (*b*). And though now, by the Judicature Act, 1875, Order XVII., different causes of action may be joined in one proceeding, yet this privilege is subject to the rule that they shall be capable of being conveniently tried and disposed of together; and actions for the recovery of land are expressly excluded from that category (*c*).

By the Partition Act, 1868, the proceeding is described as "a suit for partition where, if this act had not been passed, a decree for partition might have been made." It was obvious, therefore, that the bill in such a suit must have con-

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(*a*) Partition Act, 1876, sect. 7.

(*b*) *Slade v. Barlow*, L. R., 7 Eq. 296; *Burt v. Hellyar*, 14 Eq. 160.

(*c*) Judicature Act, 1875, Ord. XVII., Rule 2.

tained a prayer for partition, although the object of the suit was sale only.

Accordingly, we find in several cases, the court directed the prayer to be amended to that effect before granting a decree for sale (*d*). The legislature, however, evidently did not mean to give to the defendants alone the right of requesting a sale; and it must therefore be considered that it was intended that a plaintiff should pray in the alternative for a partition or sale, so as to give both parties an opportunity of arguing, and the court an opportunity of deciding, on the question of expediency between partition and sale. Nevertheless the proceeding was to be a *partition suit*.

The 7th section of the Act of 1876 now provides that it shall not be necessary for a plaintiff to pray for partition; but it does not repeal the words in the original act defining the nature of the suit, it merely adds something enlarging the scope of the definition. "An action for partition," says the 7th section, "shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition." But a partition need not be claimed.

The proceedings, it would seem, must still be an action in which the court can, if necessary

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(*d*) *Teall v. Watts*, L. R., 11 Eq. 213; *Holland v. Holland*, L. R., 13 Eq. 406.

or proper, make a judgment for partition (say, at the request of a defendant).

What estates  
are subject to  
partition.

Let us, therefore, consider what estates and what property could, before 1868, be made the subject of a partition suit.

Estates in fee.

The statute of 31 Hen. 8, c. 1, relates only to estates in fee simple; the statute of 32 Hen. 8,

Tenants for  
life or years.

c. 32, extends its provisions to joint tenants and tenants in common for term of life or years; but it was provided (*sect. 2*), that no partition under the statute should be "prejudicial or hurtful to any person or persons, their heirs or successors, other than such which be parties to the said partition, their executors or assigns." It was,

Copyholds.

therefore, ruled that copyholds were not subject to partition, as the partition might prejudicially affect the lord's rights also (*b*), for the same reason, the act did not apply to customary freeholds. But

Customary  
freeholds.

this was altered by the statute 4 & 5 Vict. c. 35, s. 85 (*c*), which enacts, that, from and after the passing of that act, it shall be lawful for any court of equity, in any suit to be thereafter instituted therein for the partition of lands of copyhold or customary tenure, to make the like decree for ascertaining the rights of the respective parties to the suit in such lands, and for the issue of a

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(*b*) *Horncastle v. Charlesworth*, 11 Sim. 315; *Jope v. Morshead*, 6 Beav. 213.

(*c*) Appendix, p. 122.

commission for the partition of the same land, and for the allotment in severalty of the respective shares therein, as, according to the practice of such court, may now be made with respect to lands of freehold tenure.

As to leaseholds for years, we have seen that Leaseholds. they are expressly included in the stat. 32 Hen. 8, c. 32 (c). But in a case in Ireland, before Lord Chancellor Hart (d), he refused to decree a partition of a leasehold house in Dublin between two joint tenants, because to carry out a division would be an act of waste, which the landlord might restrain by injunction. This case was cited before Lord Langdale in *Jope v. Morshead* (e).

The court has, nevertheless, frequently exercised its jurisdiction in the case of leaseholds, and it does not appear that in any recent case objection was taken to the jurisdiction of the court by any of the parties to the suit ; it is presumed that the lessor would not be affected by the proceedings.

It would seem doubtful whether reversions, Reversions. expectant on an estate of freehold, are subject to the jurisdiction of the court as to partition.

Lord Coke says, that the word *tenet*, in the writ of partition, implies a tenant of a freehold, "and, therefore, if one coparcener make a lease for years yet a writ of partition doth lie; but, if

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(c) Appendix, p. 119.

(d) *North v. Ginnan*, Beatty, 342.

(e) 6 Beav. 213.

one or both make a lease for life, a writ of partition doth not lie between them, because non insimul et pro indiviso *tenent*, they do not hold the freehold together, and the writ of partition must be against the tenant of the freehold" (*f*). And the Lord Chancellor (Hatherley), in *Evans v. Bagshaw* (*g*), seems to confirm the view that the doctrine of Lord Coke is in force, in Chancery. But that case did not raise the point, the plaintiff there had a reversion in an undivided share, and the other shares were in possession.

In that case, moreover, Fitzherbert was not quoted, which is a distinct authority for a contrary opinion. Fitzherbert says (*h*), "Partition may be made of an advowson or of a reversion, that one shall have the reversion of such acres and another shall have the reversion of other acres, and such partition may be without deed." Fitzherbert is evidently speaking of a reversion expectant on an estate for life, else he would not have coupled it with an advowson; and this passage from the *Natura Brevium* is quoted by Mr. Allnatt in his work on Partition as an authority for the general proposition that reversions are partible (*i*).

It is clear that a joint tenancy in a reversion

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(*f*) Co. Litt. 167 *a*.

(*g*) L. R., 8 Eq. 469; 5 Ch. App. 340.

(*h*) Fitzh. N. B. 62 D.

(*i*) Allnatt, p. 7.

or remainder can be severed by either party during the continuance of the particular estate(*k*), and to grant a partition is but a step further. It would certainly seem that the court need not now hold to a mere technical rule applicable only to the old proceedings by writ of partition, which is now abolished.

As to the nature of the property subject to partition. We have already instanced the case of *Turner v. Morgan* (*l*), where Lord Eldon held that the court had no option to refuse a commission, if demanded, on the ground of mere physical obstacles in making the division, by reason of the quality or size of the property. What species of property.

It is said in the books, however, that if a A castle. castle, that is for the necessary defence of the realm, descend to two or more coparceners, it may not be divided by chambers and rooms as other houses be, as it is *pro bono publico et pro defensione regni*. But castles of habitations for private use, that are not for the necessary defence, ought to be parted between co-parceners as well as other houses (*m*).

Partition may be made of a rent-charge, and Rent-charge. by act of law the tenant of the land is subject to several distresses.

Lord Coke says that entire inheritances (of Entire inheritances.

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(*k*) Vide Fearn's Posth. Work, p. 243.

(*l*) 8 Ves. jun. 145.

(*m*) Co. Litt. 165 *a*.



which several are found in the books) are not divisible, and some inheritances which are divisible shall not be divided among parceners.

Estovers,  
corody,  
homage, pis-  
chary, com-  
mon.

He instances estovers appendant to a freehold tenement or corody uncertain, homage and fealty, a pischary uncertain, or a common sans nombre; and he mentions a case of covenant in a deed (in favour of Lord Mountjoy) that the covenantee might dig for ore in certain waste lands, and take turf for making of alum.

Different  
modes of par-  
tition.  
May be given  
wholly to one  
party.

Nevertheless, these inheritances are subject to partition in one of two ways. If the property to be partitioned consist only partly of such indivisible inheritances so that they can be awarded to one party, the others having an equivalent in other portions of the joint estate, then the partition may proceed on that footing (o).

Alternate  
enjoyment.

Should the circumstances of the property, however, be such as to render such an arrangement impossible, then the court may direct a scheme for alternate enjoyment, by means of which each has the usufruct for a time.

Manor.

In the case of a manor, we find in an old case in *Cro. Eliz.* (p), that a writ of partition of a manor was held good. It was objected that a view of frankpledge was not severable, but it was holden to be well enough, for although not

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(o) *Jope v. Morshead*, 6 Beav. 213; *Dillon v. Coppin*, *Ibid.* 217, n.

(p) *Moor v. Onslow*, *Cro. Eliz.* 759.

severable in itself, as Anderson and Glanvill held (but Walmsley and Kingsmill contra), yet the profits thereof may be divided, or it may be decided that one shall have it all one time, and the other at another time; and also, it was pointed out that being demanded to be partitioned with other property, the writ well lies, for it may be entirely allotted to one and laid in recompense to another.

In the more recent case of *Hanbury v. Hussey* (*q*), before Sir John Romilly, Master of the Rolls, it was again argued that a manor could not be divided, and was therefore not a fit subject for a suit for partition; but Lord Romilly decided otherwise, remarking that the word “manors” is expressly used in the acts of Henry VIII. He decided that although the word was in the plural, yet that the statute applied to a case of one manor, notwithstanding that by law a manor is “an entire thing,” and not severable (*r*).

Lord Coke gives an example of the alternate Land. occupation of land by two parceners:—“But there be other partitions in deed than have been here mentioned. For if a partition made between two co-parceners that the one shall have and occupy the land from Easter until the

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(*q*) 14 Beav. 152. See also *Cattley v. Arnold*, 4 K. & J. 595, and cases there cited.

(*r*) Vide *The Queen v. Duchess of Buccleugh*, 6 Modern, 150; *Cattley v. Arnold*, 4 K. & J. 595.

1st August only in severalty by himself, and that the other shall have and occupy the land from the 1st August until the feast of Easter yearly, to them and their heirs, this is a good partition.”

Advowsons.

The case of advowsons is similar: a partition may be made to take effect by means of alternate presentations (*t*). The 7 Anne, c. 28, provides, that if co-parceners or joint tenants or tenants in common be seised of any estate of inheritance in an advowson, and a partition be made between them to present by turns, every one shall be taken and adjudged to be seised of his or her separate part of the advowson, to present in his or her turn; and if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety, to present in first turn, and the other of the other moiety, to present in the second turn; in like manner, if there be three, four or more, every one shall be said to be seised of his or her part and to present in his or her turn (*u*).

Mill.

The case of a mill is mentioned by Lord Coke, who says (*x*), “and if it be of a mill, one may have the mill for a time and the other for a like time, &c., or the one toll dish and the other the second, &c., and this appeareth to be the ancient law, for it is said:

Other hereditaments.

“*Sunt aliæ res hæreditariæ quæ veniunt in partitionem, quæ cùm dividi non possunt, conce-*

(*t*) *Matthews v. Bishop of Bath and Wells*, 2 Dick. 652.

(*u*) See Appendix, p. 107.

(*x*) Co. Litt. 165 *a*.

*duntur uni; ita quòd aliæ cohæredes alibi de communi hæreditate habeant ad valorem, sicut sunt vivaria, piscariæ, parci; vel saltem quòd partem habeant pro defectu, sicut secundum piscem, tertium vel quartum; vel secundum tractum, tertium vel quartum. Item, in parcis secundam, tertiam aut quartam bestiam."*

In this way even the services of a villein have been partitioned (*y*).

These cases of partition by alternate enjoyment of the joint property are partitions only as to possession and profits, and do not effect a severance of the estate of inheritance (*z*).

Partitions as to profits do not effect severance of estate.

It will be seen that both in the Act of Anne and in Coke the arrangement as to alternate enjoyment is nevertheless spoken of as a "PARTITION," and there will therefore be few cases where an inheritance is not, under the rules laid down by the foregoing authorities, the subject of partition of one kind or other.

Should such cases, however, occur, it would seem that the Partition Act, 1868, would not apply to them, nor would it enable the court to order a sale adversely, although the same reasons which prevented its decreeing a partition might not operate against the policy of a sale; as the words of the statute are precise, and restrict its operation to those cases in which the court could decree a partition.

Sale cannot be decreed where no partition possible.

(*y*) Co. Litt. 164 b.

(*z*) *Corbet's case*, 1 Co. Rep. 87.

*What Persons can maintain a Suit for  
Sale of Land under the Partition Act,  
1868.*

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By the terms of the statute, the plaintiff must be a person who might have maintained a suit for partition if the act had not passed.

Co-parceners.

At common law, the right to insist on partition was only in the case of co-parceners; in early times, probably, other cases would be rare.

Joint tenants,  
tenants in  
common.

We have seen that the statute of 31 Henry VIII. gave the right to every joint tenant or tenant in common in possession to sue for partition, and the statute of 32 Henry VIII. extended the right to tenants for life or years (a).

Tenants for  
life or years.

The right of a tenant for life to a partition is not affected by the circumstance that his estate is determinable before his death by any circumstance (such as, for instance, his marriage) (b).

Reversioner.

A reversioner of an undivided share has no such right. We have already discussed (*ante*, p. 15), whether an estate in reversion may be made the subject of a partition; but it is clear that if a man have only a reversionary interest in a moiety or other undivided share, he cannot bring an action for partition against the owners in possession of

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(a) *Gaskell v. Gaskell*, 6 Sim. 643.

(b) *Hobson v. Sherwood*, 4 Beav. 184.

the other moiety or shares. And he cannot cure the defect of title by acquiring the estate in possession during the progress of the suit (c).

A tenant by the curtesy is entitled to claim partition under the statute of Henry VIII. (d). Tenant by curtesy.

At common law, an infant could sue out a writ of partition by his next friend. Infant.

In Chancery, an infant or married woman could sue for a commission for partition. Married woman.

A lunatic may sue by his committee, who must, however, be authorized to that effect by an order in lunacy. Lunatic.

On the other hand, a person of unsound mind, not so found by inquisition, cannot properly sue for partition by a next friend; the matter must be dealt with in lunacy (e). Person of unsound mind.

Subject to the foregoing observations, any joint tenant, or tenant in common, or other person having an undivided interest in land might formerly sue for partition; and now, under the Statute of 1868, may bring an action for sale under the statute.

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(c) *Evans v. Bagshaw*, L. R., 8 Eq. 469, and 5 Ch. App. 340.

(d) Co. Litt. 175 b.

(e) *Halfhide v. Robinson*, L. R., 9 Ch. App. 873.

### *Request for Sale instead of Partition.*

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Right to demand partition not taken away.

It must be borne in mind that the recent act, in giving the court the power of directing a sale, where formerly only a partition could have been decreed, has not taken away the right of a tenant in common or joint tenant to demand a partition in the last resort if a sale be denied.

This *primâ facie* right of every owner to a partition underlies the jurisdiction. But the right is now limited by the statute, the court having acquired power to refuse to give effect to it, if a sale be requested by proper parties in one or other of the special cases or circumstances mentioned in the act.

Request for sale;

This exceptional jurisdiction of the court is therefore founded on a REQUEST from some one or more owners of the property. And the cases to which the act applies may be divided into two classes: (1) where the *request* comes from the owner or owners of an equal or the largest share; (2) where the *request* comes from the owner or owners of less than a moiety of the property.

by whom to be made;

Let us, therefore, in the first place, consider who may make the request, and how it should be made.

Until the Act of 1876 there was a technical <sup>by plaintiff;</sup> difficulty in the way of a request for sale from a plaintiff. We have seen that it was necessary for him to pray for a partition; therefore, when the plaintiff desired a sale, the practice was to pray for a partition or for a sale (in the alternative), and at the hearing to request a sale (a). This practice, though somewhat inconsistent where the sole object of the suit was sale, and not partition, satisfied the exigencies of the case, as defined by the statute. Now, however, it is enacted by the 7th section of the Act of 1876, that a partition need not be prayed for; and, therefore, the plaintiff may, in his statement of claim, request a sale, which course, in a contested case, would not only be proper and convenient, but probably important with a view to his success before the court; and possibly, also, as to costs.

A defendant may request a sale when the <sup>by defendant;</sup> plaintiff sues for partition, and it has been the practice to allow this also to be done at the hearing, although in contested cases it would clearly be convenient and proper, and also important with a view to the costs of suit, that the request should appear distinctly on the pleadings, so that the evidence may be directed to the question of expediency, or otherwise, of the desired sale.

Formerly it was doubted whether an infant or <sup>infant;</sup>

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(a) Vide Form of Decree, p. 51, post.



person under  
disability.

married woman could request a sale (*b*), even though it might be for his or her benefit; but now by the Partition Act, 1876, sect. 6, it is provided that a request for sale may be made on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability; but the court shall not be bound to comply with any such request on the part of an infant, unless it appear that the sale will be for his benefit.

Lunatic.

Person of un-  
sound mind.

We have seen from the observations of Lord Justice James, in the case of *Halfhide v. Robinson* (*c*), that a person of unsound mind cannot commence an action for dealing with his real estate by a next friend, and that it is proper in the case of such a person to take proceedings in lunacy and obtain an order for the committee to bring the action.

Those observations were made by the learned judge before the Act of 1876, but they would now apply to the case of a request for sale under the act to be made either by counsel at the hearing or by a defendant in his pleading.

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(*b*) Vide *France v. France*, L. R., 13 Eq. 173; *Higgs v. Dorkis*, 13 Eq. 280; *Davey v. Wietlisbach*, 15 Eq. 269; *Grove v. Comyn*, L. R., 18 Eq. 387.

(*c*) L. R., 9 Ch. App. 374.

It may be here noticed that a sale of an infant's estate under the Partition Acts does not operate as a conversion of realty into personalty. Conversion.

A sale rightfully made is no doubt a conversion in every case (*Steed v. Preece*) (*d*), and the property must be taken by the heir or personal representative in the state in which it is found, unless there is an equity to have it reconverted. The importation, however, of the Leases and Sales of Settled Estates Act into the Partition Act, 1868, creates such an equity in case of a sale directed by the court of a share of an infant or person under disability (*Foster v. Foster*) (*e*). Equity for re-conversion.

But when the person is of full age whose estate is ordered to be sold, and he dies between the date of the decree and the sale, then the conversion is complete, and the proceeds of sale must be treated as personal estate (*Arnold v. Dixon*) (*f*).

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(*d*) L. R., 18 Eq. 192.

(*e*) L. R., 1 Ch. D. 588.

(*f*) L. R., 19 Eq. 113.

*Request for Sale by Owners of a  
Moiety and upwards of the Pro-  
perty (4th Sect.).*

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*In a suit for partition where, if this act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or amongst the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.*

Onus on de-  
fendant.

This section casts on the parties objecting to a sale the onus of satisfying the court of the greater benefit to the parties of a partition over a sale, otherwise the court is bound to order a sale.

As the Master of the Rolls observed in the case of *Drinkwater v. Ratcliffe* (a), "The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shown; they have not to

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(a) L. R., 20 Eq. 528.

show any reason for the sale, but a reason to the contrary must be shown."

The reported cases decided on this section are *Lys v. Lys* (b), *Pemberton v. Barnes* (c), and *Wilkinson v. Joberns* (d).

In *Lys v. Lys*, the plaintiffs requesting the sale *Lys v. Lys.* owned between them one moiety, and, although one of the plaintiffs was an infant, Vice-Chancellor Giffard was of opinion, "That the act threw on the defendants opposing the sale the onus of showing that it ought not to be directed, and no sufficient reason against a sale had, in his opinion, been adduced by the defendants in their affidavit; a sale would therefore be directed."

*Pemberton v. Barnes* was a case which came *Pemberton v. Barnes.* before Lord Hatherley (Chancellor), on appeal from Vice-Chancellor Malins. The Vice-Chancellor had laid down the doctrine of construction as follows:—"It is not the object of the act, so far as I can see, that in all cases the owners of one moiety of an estate, because they think that by selling it altogether they could get more money for it than by selling it in parts, may force on the owners of the other moiety the obligation to submit to have their property converted into money. It therefore appears to me, that whenever the court sees that there is not

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(b) L. R., 7 Eq. 126.

(c) L. R., 6 Ch. App. 685.

(d) L. R., 16 Eq. 14.

sufficient reason for selling, it ought not to direct a sale." But the Lord Chancellor, in overruling the Vice-Chancellor's decision, remarked, "The 4th section makes it imperative on the court, in a certain state of circumstances, to order a sale, unless it sees good reason to the contrary, that is to say, the onus is thrown on the person who says that the court ought not to order a sale, to show some reason why it should not do so." Again, in the same judgment, the Lord Chancellor proceeds thus:—

"The only question remaining is, what is the meaning of the words 'unless the court sees good reason to the contrary'? The whole judgment of the learned Vice-Chancellor proceeds upon this principle:—'I do not think the legislature could have meant that large estates, where there is no difficulty about partition, should be sold.' The answer to that is this: The difficulty of partition is dealt with in section 3, and there is not in section 4 a single word about the size of the estate or the difficulty of partition: it simply speaks of a case where half the parties interested desire a sale, and it provides that they shall have a preponderating voice. Why they should have it is not for me to say, but the legislature has thought fit to say so. It would be striking the section out of the act to say that the owners of the other moiety have no more to do than to come and say, 'We do not wish for a sale.' The

legislature has said that there shall be a sale if the owner of one moiety asks for it, unless good reason be shown to the contrary. The Vice-Chancellor has said (for he puts his judgment quite as high as that), 'I cannot see why one party should be turned out of his moiety against his wish, simply because the owner of the other moiety says that he desires the estate to be sold.' The Vice-Chancellor then urges as a reason against a sale, that the two part-owners come from a common ancestor, and that the testator gave the estate to them as land. No doubt he gave it as land; but he gave it to them absolutely, and there was nothing to prevent them from disposing of it as they thought fit. Consequently, I do not see that its coming from a common ancestor makes any great difference. Neither party has ever lived upon the property. It has been vacant ever since the death of the tenant for life for about six years, and the parties who object to a sale have been living two hundred or three hundred miles off all this time. I cannot see that any reason is given against a sale beyond this, that the owners of one moiety object to it; and I cannot think it a sound construction of the act to say that this is a sufficient reason."

*Wilkinson v. Joberns* (e) was a case where the sale was resisted by the defendant, who owned a

*Wilkinson v.  
Joberns.*

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(e) L. R., 16 Eq. 14.

moiety, and was tenant of the whole estate. He endeavoured to show that a sale would be disastrous to himself, and that a partition was quite feasible ; Lord Selborne, Lord Chancellor (sitting for the Master of the Rolls), however, said : “ I think the plaintiffs are entitled to what they ask. The act of parliament clearly throws the burden of proof upon the tenant in common who resists sale and claims partition.”

As to reasons  
for refusal.

There is as yet no authority to show what the court would consider as a sufficient reason under the 4th section to warrant a refusal of a sale requested by the owners of a moiety of the property. It would appear, however, from the foregoing cases, that loss or inconvenience to one party alone will not be sufficient reason.

*When the Parties requesting the Sale  
are in a Minority (3rd and 5th Sects.).*

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THE onus in these cases rests with the party or parties requesting the sale, who must convince the court of the general expediency of a sale rather than a partition (3rd section), or of the hardship of a partition to a particular owner, in which case the court can order a sale at the request of such owner without being convinced of its abstract expediency, provided the other owners refuse to purchase his share at a valuation (5th section).

Onus on party  
requesting sale.



*Request for Sale by a Minority, under the  
3rd Section.*

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POWER to Court to order Sale instead of Division.]—“ *In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any of the others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.*”

It will be observed that there are two things essential to the obtaining a judgment or order for sale under this section, viz., first, a request from some party interested; and, secondly, satisfactory evidence that a sale of the property and

a distribution of the proceeds will be more beneficial for the parties interested than a partition.

We have already treated (a) of those requests, and we must now consider the question of estimated advantage to the parties from the adoption of one course rather than the other.

In the first place, the advantage must be an advantage to *the parties* interested, not to one or more of those parties (b). Benefit must be to the parties collectively.

And the benefit must be a substantial pecuniary benefit, not a fanciful or sentimental benefit. In *Drinkwater v. Ratcliffe* (c), Sir G. Jessel, Master of the Rolls, remarked, "I am to direct a sale if I am of opinion that the sale would be more beneficial for the parties interested. What does that mean? It means in a pecuniary sense. I cannot go into questions of sentiment, I must look to the monetary results." Must be substantial benefit.

"Now it is proved and not denied that the value of the farm is very much larger to sell than its rental would imply. It is stated that there are factories in the neighbourhood, and this property, which is sworn to by the defendant as being worth 36*l.* a year, the plaintiff's witnesses say would fetch 2,600*l.*,—the defendant's witnesses, it is not worth so much; but they do not venture

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(a) Ante, p. 24.

(b) Vide *Osborne v. Osborne*, 6 Eq. 338; *Powell v. Powell*, 10 Ch. App. 135.

(c) L. R., 20 Eq. 533.

to say how much less it is worth, from which I come to the conclusion that even in their opinion it would fetch very much more than the something over 1,000*l.*, which would be its value at thirty years' purchase; probably it may be worth sixty years' purchase, or something of that sort, which would be 2,000*l.*; the plaintiff's witnesses put it as high as 2,600*l.* It is a farm so situated that it can be used for other purposes than farming purposes. It is advantageous for *all persons interested that it should be sold instead of divided* in a pecuniary sense, which, as I have said before, is the only one I am called upon to deal with. I therefore direct a sale."

In determining the question of comparative benefit to the persons interested of selling or dividing their estate, the principal matters to be considered are those enumerated in the section under discussion, viz.:—(a) *The nature of the property*; (b) *The number of parties interested*; and (c) *The absence or disability of some of the parties interested*.

To this catalogue the section adds (d) *any other circumstance*, so that the court is absolutely unfettered in its choice of reasons for coming to a decision on the question of the superior benefit, or the contrary, to the parties of a sale over a partition of the property.

Nature of  
property ;

*The Nature of the Property.*—The property may not be practically capable of division; a

single house for instance, such as the court had a house; to deal with in the case of *Turner v. Morgan* (d); or it may be a property which, though physically capable of division, could not be divided equally. Such as we may imagine in the case of a house and land where the land could not be conveniently held without the house, and the house might be too large to be held with only a portion of the house and land; land, or the property would suffer materially in value from not being sold as a whole.

We may again quote from the judgment in a farm. *Drinkwater v. Ratcliffe* (e), where the Master of the Rolls, speaking of the division of a property, consisting of a farm-house and outbuildings and thirty acres of land, into thirty-six parts, says, "How that is to be done I have not a notion. The plaintiff's witnesses say it is practically impossible. All the defendant's witnesses say it is not impossible. I agree it is not impossible; but it certainly is very difficult, especially as one does not know how the farm-house would go, or what its value is, or whether it would be divided or not divided. But if ever there was a case, where by reason of the nature of the property you could not divide it conveniently, we have it here."

*The Number of the Parties interested.*—There may be cases where the property is perfectly Number of owners.

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(d) 8 Ves. jun. 145.

(e) L. R., 20 Eq. 532.

capable of convenient division into a moderate number of shares, but where the parties are so numerous as to render a sale expedient. This will often be a relative estimate; for what would be a large number in the case of a small property might not be excessive in the case of a large estate, if nothing in the nature of the property required its being preserved entire.

In *Drinkwater v. Ratcliffe* (f) (already quoted), the Master of the Rolls, in addition to his observations on the *nature of the property*, proceeded as follows:—

“The next ground specified by the section is number of parties. Here it is quite obvious that there are a great number of parties; six of them would have one thirty-sixth apiece (the property consisted of a house and thirty acres), and there are three more; there are nine altogether, and some of them are married women, whose husbands would have to join.”

It is well known that many hundreds of persons are sometimes interested in one property.

Absence or  
disability.

*The Absence or Disability of some of the Parties.*—Absence or disability of some of the parties interested in landed property is doubtless a good reason why the other persons should desire to put an end to the joint ownership,

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(f) L. R., 20 Eq. 533.

because there may in that case be no power of leasing, repairing or improving the property. It is not, however, at first sight easy to see how this circumstance could bear on the question of whether a sale or a partition of any particular estate would be most beneficial to the parties interested, for the difficulties of management would only operate against the absent parties and apply to their shares if partitioned, if there were no other reason against the partition.

*Any other Circumstance.*]—These words give the court a wide discretion.

*Notwithstanding the Dissent or Disability of any other of the Parties interested.*]—The court is to exercise its unfettered discretion as to the benefit to the aggregate of the parties interested. This enactment puts an end to the possibility of a wilful or perverse obstruction to a sale by some of the persons interested, even if a majority.

Notwithstanding dissent of majority.

*Request for Sale under the 5th Section.*

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As to Purchase of Share of Party desiring Sale.]—"In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given the court may order a valuation of the share of the party requesting a sale, in such manner as the court thinks fit, and may give all necessary or proper consequential directions."

In order to understand this provision it is necessary to revert to the former cases enumerated by the act.

Application of  
the 5th section.

In the first place (as we have seen), where the parties requesting the sale have more than a moiety, the court is bound to give effect to their wish, unless it disapproves altogether of the sale;

therefore the 5th section must be intended to apply only to cases where the parties desiring the sale are in a minority; and, moreover, the case must be one where those parties are unable to satisfy the court that the sale would be more beneficial, or more profitable in a pecuniary sense for all the persons interested in the estate, that it should be sold rather than divided, otherwise it would come under the 3rd section. We must, however, suppose the court so far to approve of the proposal as to be desirous of exercising its jurisdiction in favour of the plaintiff or other party requesting a sale, whose personal views or interest require a sale (although a sale might not result in advantage to the owners taken collectively), and to consider it a case where justice requires that the person requesting the sale should not be put to disadvantage in realizing his share. Under these circumstances the legislature considers it just that if the majority resist a sale they should purchase the share of that person at a proper valuation. Accordingly, although the court cannot compel them so to purchase, the act arms the court with the power to order a sale of the whole estate if they refuse to do so.

This jurisdiction of the court is based on the possible hardship to one or a few of the parties interested of compelling them to take their share in specie by means of a partition as the only

Hardship to individual owners.



means of realizing their property ; it is entirely independent of any general benefit to the parties interested in the estate taken collectively.

Case of coal mine.

The owner of a very small share, say  $\frac{3}{8}$  in a coal mine, for instance, might find his undivided share entirely valueless to him for the cost which would be incurred by sinking a shaft and working it separately, and yet it might be impossible to show the court that a sale of the whole mine would be more beneficial to *the parties interested* (meaning the whole of them collectively) than a partition ; on the contrary, the majority might be interested in the opposite result, for, if they agreed together, they might go on working  $\frac{5}{8}$ ths of the mine just as profitably as the whole, and have one the less with whom to divide the profits.

Majority must buy share of minority or submit to a sale of the whole.

The unfortunate owner of the share, which we will suppose he is under the absolute necessity of realizing, would in such case probably find himself compelled to sacrifice it altogether or to sell it to his partners at any price they might choose to give for it. To remedy this state of things, the court has now the power to interpose, and require the owners of the bulk of the property, if they wish to preserve it from sale, to buy the share of the person compelled or desiring to realize at a fair valuation.

This great, but not unjust benefit, is thus conferred on owners of small shares in large estates,

who were formerly almost entirely at the mercy of the owners of the greater proportion, if circumstances compelled them to realize (*vide* the judgment of the Master of the Rolls in the case of *Drinkwater v. Ratcliffe* (a)).

It will, however, be observed that the act gives no power to the court to require any owner to sell his share to his co-proprietors. It can only make the latter buy or submit to a sale. The provision was intended for the benefit of the party applying for a sale; and if the court will not grant his application, he may withdraw his request, and, falling back on his rights, claim a partition.

No power to insist on sale of share by party requesting sale of the whole.

This is exemplified by the case of *Williams v. Games* (b), where the plaintiff was owner of one-seventh of the estate, and the persons owning the other six-sevenths were defendants.

*Williams v. Games.*

The plaintiff prayed for a sale or partition, but requested a sale.

The owner of one other seventh also desired a sale; but the owners of five-sevenths resisted that measure. The Master of the Rolls, Sir G. Jessel, under these circumstances, made a decree that certain of the defendants undertaking to purchase the two-sevenths, a valuation thereof should be made, and that the owners of the two-sevenths should be paid the amount of the valuation, and

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(a) 20 L. R., Eq. 528.

(b) 10 Ch. Ap. 204.

execute conveyances of their shares; and that, thereupon, an inquiry should be made as to the persons entitled, and a partition be made accordingly. The plaintiff, however, on appeal, insisted on a sale or partition of the whole estate, not being satisfied with the prospect of a valuation of his share, and preferring to that course a partition.

The Lords Justices held that he was right, that the court could not compel one part owner to sell his share against his consent; but that if he were held not to be entitled under the statute to an order for sale of the whole estate, he might withdraw his request for a sale, and insist on a partition. Their lordships, therefore, reversed the decree of the Master of the Rolls, and made a decree for partition in the usual terms (giving no costs of the appeal).

*Account of Rents and Profits by Tenant  
in Occupation.*

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WHERE one of several co-tenants has been in occupation of land previously to a suit or action for its partition or sale, the question arises whether his possession has been in respect of the entire estate or only of his undivided share.

Nature of possession,

If he has enjoyed by virtue of a lease or other agreement from his companions or co-tenants, then he must account for rents, issues and profits received by him, or pay an occupation rent or an agreed rent, according to circumstances.

by lease or agreement.

In *Turner v. Morgan* (a), the occupying tenant, who was the owner of a third share and had held the whole property under a lease up to a certain time, was decreed to pay an occupation rent for the time subsequent to the expiration of his lease.

*Turner v. Morgan.*

In *Storey v. Johnson* (b), the occupying tenant (A) was owner in fee simple of one undivided third of the estate, lessee of one other third, under B, and the remaining third belonged to C. The court ordered him to pay to B the rent reserved by the lease of the one-third

*Storey v. Johnson.*

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(a) 8 Ves. 145.

(b) 2 You. & Coll. 586.

belonging to B, and to pay an occupation rent for the remaining third to C. Lord Abinger, in delivering judgment, said:—It appears, therefore, upon this part of the case that Johnson ought to account to Storey or Ed. Jones for one third part of the rent reserved by that lease since Hall's death, and that he ought to account to W. S. Jones (C) for one-third part of the fair occupation rent, to be determined by the master."

*Pascoe v.  
Swan.*

*Pascoe v. Swan* (c) was the case of an infant's one-third share. The defendant, who was entitled in his own right to another third, had been in occupation of the estate, which was a farm, and had appropriated the profits. The infant, who was the plaintiff, prayed for a partition, and that defendant might pay an occupation rent in respect of the plaintiff's third share. The Master of the Rolls held that the defendant must be considered as having entered on the estate of the infant, and must pay an occupation rent, but he was to be allowed for lasting improvements.

Infants.

It seems from this case, and from other cases where infants are concerned, that the court will presume that the occupying tenant has entered on the infant's estate, unless the contrary clearly appears, and will charge him with an occupation rent, although no lease or agreement is proved.

The reason for this lies in the rule that a

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(c) 27 Beav. 508; see also *Wills v. Slade*, 6 Ves. jun. 498.

party entering on an infant's estate enters as guardian or bailiff of the infant, and equity treats him as a trustee (*d*).

But if it is shown that the infant never was constructively in possession, and that the occupying tenant is in upon a different title, then the presumption in favour of the infant does not arise.

In *Crowther v. Crowther* (*e*), Lord Romilly, *Crowther v. Crowther.* M. R., thus expressed himself: "The court will not allow an infant to be turned out of possession of an estate without legal process, and accordingly the cases cited are all instances of a person intruding on an infant in possession, either by himself or his guardian or bailiff; but if it is admitted that the infant never was in possession or in the enjoyment of the property either by himself or his guardian, he stands in the same position as any other person, and must first establish his legal title. That is the case here; it is not alleged that the infant was ever in possession either by himself or his guardian, but the bill alleges an adverse title under a contract entered into by the infant's father. It is a mere case of adverse possession under a title springing from a contract entered into by his father."

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(*d*) *Dormer v. Fortescue*, 3 Atk. 124; cited by Lord Cranworth, *Hicks v. Sallitt*, 3 De Gex, M. & G. 803.

(*e*) 23 Beav. 305; see also *Newburgh v. Bickerstaffe*, 1 Vern. 295.

Possession by  
tenant in his  
own right.

Stat. Anne,

at common  
law.

*Wheeler v.  
Horne.*

Where the occupation of one of several co-tenants has been in his own right merely as owner of an undivided moiety or other share, the case rests upon the statute 4 Anne, c. 16, which provides that actions of account shall and may be brought and maintained by joint-tenants and tenants in common and their executors and administrators against each other as bailiffs for receiving more than comes to their just share and proportion.

An action of account would not lie by one tenant in common against another as his bailiff at common law, unless he were so particularly appointed (*f*).

Such an action must have been brought under the statute of Anne above referred to. This was explained in the case of *Wheeler v. Horne* (*g*) to be a very different proceeding, both on principle and in practice, first, because a bailiff at common law is answerable not only for his actual receipts, but for what he *might* have made of the lands but for his wilful default; whereas under the statute he is answerable only for so much as he has *actually* received more than his just share and proportion: secondly, because the auditors in an action of account at common law could not administer an oath unless in one or two special

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(*f*) Co. Litt. 172*a*.

(*g*) *Wheeler v. Horne*, Willes, 208.

cases, whereas by the statute (*h*) the auditors might examine the parties on oath.

*Henderson v. Eason* (*i*) is considered the leading *Henderson v. Eason.* case on this question. That was an administration suit, where the defendant Eason was the brother and executor of the testator, and had suffered the latter for several years before his death to occupy exclusively a farm, of which they were co-tenants in common in equal moieties, without demanding or receiving any rent or other remuneration from him. The testator cultivated the farm and appropriated the produce to his own use. The Master in Chancery, under the circumstances, allowed a claim by the defendant to retain out of the testator's estate a moiety of the amount of six years' fair occupation rent for the entire farm; and the Vice-Chancellor (Shadwell) confirmed the master's report. Lord Cottenham, however, overruled this decision, and directed an action at law to be brought by the defendant against the other executor, on the ground that there was no relief in equity unless the case were one in which an action would lie at law.

The Court of Queen's Bench decided in favour of the right of the plaintiff in the action to an account of profits; and judgment was entered up that the defendant as executor should account

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(*h*) Vide Appendix, p. 120.

(*i*) Reported 15 Sim. 306; 2 Phil. 308; 12 Q. B. 986; 17 Q. B. 701.



with the plaintiff for the time aforesaid (six years), in which the testator was bailiff, &c., and an account was afterwards taken by two masters of the Court of Queen's Bench, who found that the sum of 900*l.* was due to the plaintiff from the defendant (i).

Distinction  
between taking  
and receiving.

Statute only  
applies to  
money received  
from a third  
person.

From this decision there was an appeal to the Court of Exchequer Chamber, where it was overruled in an elaborate judgment delivered by Baron Parke. That learned judge (drawing a distinction from the words of the statute between *receiving* and *taking* more than his just share, and observing that there was no mention of *issues and profits* in the statute, but merely the receipt of *more than the just share*) laid down that the statute was only applicable where the tenant in common received *money* or something else which another person gives or pays. The statute, therefore, in the view of the court included all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent-charge or any money payment in kind due to them from a third person, receives more than his proportionate share according to his interest in

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(i) From the statements in the judgment of Baron Parke it would appear that this sum was computed as a fair occupation rent, and not as the balance of an account of issues and profits, for the judgment expressly points out that there is no evidence of profit. It was, in fact, the same sum as had been already found by the Master in Chancery as a fair occupation rent.

the subject of the tenancy. But the court saw insuperable difficulties in extending the operation of the statute to cases in which one has enjoyed more of the benefit of the subject or made more by its occupation than another. It thought it inequitable to hold in the case of a dwelling-house, barn, or room solely occupied by one tenant in common without ousting the other, that by the simple act of occupation he should be liable to a rent. Again, in the case of land, where one employs capital and labour in cultivating it, the risk of the cultivation with the profit and loss were his own, and the court considered that since he could not claim a moiety of the loss, if any, as he would, had the land been cultivated by the mutual agreement of the co-tenants, he ought not to be accountable for the profits.

The learned judge, however, remarked that the evidence stated in the bill of exceptions did not show whether a profit had been made in the case before the court or whether the occupation had been by mutual agreement, and the court, therefore, only decided that upon the evidence in that case (*k*) there was nothing to warrant the

Occupation  
rent.

Questions not  
raised in plead-  
ings.

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(*k*) It was agreed at the hearing that, as the defendant had received the whole profits, he must have received more than his share. The court seemed to think it was possible he might have made a loss. The masters had, however, found that 900*l.* was due on the account. It must have

No evidence  
for jury.

jury in coming to the conclusion that the defendant had received more than his just share within the meaning of the act; also that there was no evidence that he had had the care or management of the farm for the common profit of the co-tenants, as averred in the declaration. The result of the decision was to reverse the judgment of the Court of Queen's Bench, and to pronounce against the right to recover the 900*l.* from the occupying tenant found by the masters to be due from him under the foregoing circumstances.

*M' Mahon v.  
Burchell.*

In the case of *M' Mahon v. Burchell* (1), Lord Cottenham said that the proposition, that a plaintiff, having occupied a house not in entirety but as a tenant in common, should thereby become liable to his co-tenants, was contrary to law; for the effect would be that one tenant in common, by keeping out of the actual occupation, might convert the other into his bailiff,—in other words, prevent the other from occupying except on terms of paying him rent.

There might, however, (he added) be various modes of occupation which would make the party occupying liable for rent to the other tenants in common.

Distinction  
between.

From these cases it would seem that one great distinction to be drawn is between a claim for

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been taken as an occupation rent, and that there was no evidence of profit, although the report is not explanatory on this point.

(1) 2 Phillips, 131.

occupation rent and a claim for an account of rents and profits received.

The former cannot arise without agreement, <sup>Occupation rent.</sup> except in the case of an infant, where the court raises a presumption of law in favour of the infant; there must (between persons *sui juris*) be consent express or implied creating the relation of landlord and tenant, such as was to be inferred in the case of *Turner v. Morgan* and *Storey v. Johnson*, before referred to (m).

The rule as to rents and profits as laid down in *Henderson v. Eason* would appear to be as follows:—

In the first place, the occupying tenant must <sup>Rent received from third persons;</sup> account for all sums of money received by him in respect of the entirety by way of rent or rent-charge payable to both, or any money payment or payment in kind due to them from another person.

But insuperable difficulties were said to arise <sup>and issues and profits from cultivation of the land.</sup> when it is attempted to apply the statute to *issues and profits* made by an occupying tenant from the cultivation of the land. <sup>At common law.</sup> We have seen that the language of the judgment went further than was necessary for the case in hand; as the court in fact in that case only decided against allowing an occupation rent, observing that upon the evidence there was nothing to warrant the

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(m) *Anto*, p. 45.

jury in coming to the conclusion that the defendant had received more than his just share within the meaning of the act, or made any profit at all. The difficulty contemplated by the court as to taking the account never arose; moreover, it was a difficulty arising out of common law practice, and would not have been insuperable in a court of equity.

In Chancery. In the case of *Hyde v. Hindley* (n), Lord Kenyon, Master of the Rolls, directed an account of rents and profits (but not of timber felled).

In the case of *Lorimer v. Lorimer* (o), Vice-Chancellor Leach held, that if on a partition bill the defendant appeared to have received more than his just share of the rents and profits of the estate, the court would direct an account, and would not, in analogy to law, confine the relief to partition merely.

It does not appear from these two last-mentioned cases what would be included in the term "profits;" but if anything more than rent received from strangers, they must now be considered to have been overruled by Lord Cottenham's decision in *Henderson v. Eason*, that the court would not allow a claim unless and until the party had established a claim at law.

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(n) 2 Cox, 408.

(o) 5 Madd. 363.

The sale of timber from an estate would not necessarily fall within the observations of Baron Parke as to the risk and profit of cultivation, and the proceeds of such sale might almost be treated as money received from third persons to be divided among the parties interested in the land. Proceeds of sale of timber.

We have, however, seen that in the case of *Hyde v. Hindley*, the court, in granting an account of rents and profits received by the defendant, omitted (we must suppose intentionally) to direct an account (which was prayed) of timber felled on the estate.

And in the case of *Griffies v. Griffies*, V.-C. Kindersley expressly decided against an account for the sale of timber; he made the following observations: "As each party is entitled to enter on the whole property, there can be no claim by one tenant in common against another for an occupation rent. As to cutting down trees and the other acts of waste alleged in the bill, each tenant in common is entitled to exercise acts of ownership over the whole property, and no charge can therefore be sustained in consequence of such an act. As both parties concur in asking for an account of rents and profits received from strangers, an inquiry with respect to them may be made, and also with respect to substantial repairs and improvements." Griffies v. Griffies.

The last remark brings us to the concluding branch of this subject.

Money laid out  
in repairs and  
improvements.

If a tenant in common or joint tenant who has been in occupation of the estate have expended moneys on substantial repairs and improvements, he is entitled to be reimbursed what he has necessarily so expended, or expended with the concurrence of his co-tenants (*Swan v. Swan*) (p).

*Teasdale v.  
Sanderson.*

But in *Teasdale v. Sanderson* (q) Lord Romilly, Master of the Rolls, refused to grant the defendant an account of money spent in repairs and improvements, unless he would, on the other hand, agree to pay an occupation rent, observing, "These accounts must be reciprocal, and unless the defendant is charged with an occupation rent, he is not entitled to any account of substantial repairs and improvements." The decree in that case was accordingly drawn up without any direction for either account.

Summary.

To sum up the present state of the law on this subject, it would appear—

1. That if one co-tenant has been in occupation or receipt of rents and profits by agreement with his companions, if *sui juris*, or if by presumption of law in the case of infants he has entered on their estate, he must account for profits or pay rent, which latter will be either an agreed sum or a sum to be ascertained as a fair occupa-

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(p) 8 Price, 518.

(q) 33 Beav. 534.

tion rent; and he may, on the other hand, claim payment or a set-off for money laid out by him in substantial repairs and improvements.

2. If, however, the tenant in occupation be in possession as of his own estate alone or be in receipt of rents and profits in his own right, and without agreement from his companions, then he is only accountable to them for rent or other money actually received from strangers (in which category is not to be included money received by the sale of produce of the land, nor even purchase-money of timber); and although he is entitled to be reimbursed a proportion of the money laid out by him in substantial repairs and improvements of the property, the court will not allow him to receive this benefit unless he submit to pay an occupation rent, or to account for those profits which cannot otherwise be strictly claimed against him.

Whether this state of the decisions is thoroughly satisfactory, or in accordance with the spirit or true interpretation of the statute of Anne(*r*), may be questioned; but since the observations

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(*r*) In the argument of the case, *Earl of Kildare v. Eustace*, 1 Vern. 421, it was said that the jurisdiction of the courts of equity was grounded on the statute which made one tenant in common accountable to the other, so that since that statute they had become, as it were, trustees the one for the other (quoted in Vin. Abr. tit. Partition, p. 241, and Allnatt, 79).



of Lord Cottenham, in the case of *Henderson v. Eason* (*s*), above referred to, the doctrine of the courts can hardly be altered, except by a review of the cases in the Court of Appeal, unless, indeed, the recent Judicature Act should be held to have effected a change, in a matter somewhat technical in character.

Since the Partition Act of 1868, the question is of less importance, as every tenant in common may now sue for a sale of the property, if it be not capable of partition.

Receiver.

It may, moreover, occasionally be desirable to apply to the court for a receiver before sale.

The court will not grant a receiver if partition or sale is not prayed (*t*), and even in a partition suit, where the parties are *sui juris*, it would probably not do so before the hearing.

In case of infants.

But where infants are concerned, if the receipt of the rents or the occupation of the property is in the hands of one party, or where there is no person competent to give a valid receipt for rent, under the old practice the court was frequently in the habit of granting orders to appoint a receiver in partition suits before the hearing; and in many cases, from the impossibility or difficulty of actual partition, the suit never proceeded beyond that stage.

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(*s*) 2 Phillips, 308.

(*t*) *Tyson v. Fairclough*, 2 Sim. & St. 142; *Sandford v. Ballard*, 30 Beav. 109.

Also, after a judgment for sale now under the powers of the Partition Act, probably the court would have jurisdiction to appoint a receiver until sale, if the tenant in occupation were declared to be trustee for his co-tenants within the meaning of the Trustee Act, 1850. Effect of Trustee Act.

The court, however, in the case of *Bailey v. Hobson* (*u*), refused to interfere by injunction to prevent one tenant, after a decree for sale in a partition suit, from removing hay, turnips, and other crops from the land, even though such removal was contrary to custom, as between landlord and tenant. In that case Lord Justice Giffard (reversing the decision of V.-C. Stuart) held, that the defendant (who was in possession in his own right without consent of the plaintiff, and under no lease or agreement from the other undivided owners) was entitled to remove such crops, as the act complained of did not amount to waste, and the relation of landlord and tenant was not established. The powers of the Trustee Act were not invoked in that case. Injunction.

But it is presumable that the court would in any case interfere to restrain an occupying tenant in possession from actual waste or destruction of the property. Actual waste.

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(*u*) L. R., 5 Ch. App. 180.

*Practice.*

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Pleadings. THE plaintiff must clearly show his title to his  
Statement of undivided share of the estate by his statement of  
plaintiff's title. claim. It was formerly necessary that the plaintiff  
should show a legal title; an equitable title was  
not in strictness sufficient to support a partition  
suit (a). The reason given was, that the plaintiff  
would not be able to convey his share if his title  
were merely equitable. But in the case of *Cart-*  
*wright v. Pulteney* (b), where an equitable title  
only was shown by the bill, Lord Hardwicke  
did not consider the objection insuperable. He  
decreed the partition, directing the parties on  
both sides to procure their trustees to convey,  
and the master to settle the conveyances.

Trustee Act. Now, under the new act, probably an equitable  
title would suffice, even on technical grounds,  
and the powers of the Trustee Act would be  
available to get in the legal estate.

Defendant's The defendant's title need not be minutely  
title. stated in the plaintiff's statement of claim, nor

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(a) *Miller v. Warmington*, 1 J. & W. 493; *Jope v. Morshead*, 6 Beav. 213.

(b) 1 Atk. 380.

need all the owners of other undivided shares be made parties in the first instance. For the plaintiff is not supposed to know the titles of all his co-owners (c), and no objection can now be taken by the defendants for want of parties to a partition suit (d). But it is of the essence of a partition suit that the title of the plaintiffs and defendants should spring from one root. There can be no partition between persons having distinct or adverse titles as independent owners (*Miller v. Warmington*) (e).

The pleadings should likewise show the grounds on which the court is asked to exercise its jurisdiction. Reasons for sale.

If the plaintiffs requesting a sale own a moiety or upwards, it will be sufficient to say that they desire a sale, and the defendants, if they seek to resist the sale, must state the grounds on which they rely to sustain their objection.

If, however, the plaintiffs own less than a moiety, they should state a case giving them a right to it under the 3rd or 5th sections, and it will then be sufficient for the defendants to traverse the statements of the plaintiffs.

If one party has received more than his just share of rents and profits, or, on the other hand, if a party have expended his own money in permanent improvements of the joint property, then Account.

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(c) *Baring v. Nash*, 1 Ves. & B. 551.

(d) Sect. 9 of Partition Act, 1868.

(e) 1 Jac. & W. 493.

the facts should be stated on the pleadings, and an account be asked for.

Judgment at the hearing.

The court will in a proper case make a judgment or order for a sale under the powers of the Partition Act, 1868, at the hearing of the cause without preliminary inquiries, if all parties are before it and the title has been duly proved and the proper requests have been made (*Lees v. Coulton* (f); *Mildmay v. Quicke*) (g).

Preliminary inquiries.

Usually, however, the court directs preliminary inquiries, and the following are forms of a judgment or order for sale under the powers of the three several sections of the act, which we have previously considered:—

#### *Under the 4th Section.*

4th section.

Upon motion for judgment this day made unto the court by counsel for the plaintiffs, and upon hearing counsel for the defendant, and upon reading the plaintiffs' statement of claim:

Request by plaintiffs.

And the plaintiffs *who claim to be interested in a moiety and upwards of the hereditaments in the pleadings mentioned by their counsel, requesting a sale thereof*, and a distribution of the proceeds instead of a division of the said hereditaments between or among the parties interested:

The court doth order that an inquiry be made who are the parties interested in the hereditaments and property in the pleadings mentioned, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action:

And if it shall be certified that all the parties in-

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(f) L. R., 20 Eq. 20.

(g) L. R., 20 Eq. 537.

terested are parties to this action *and that the plaintiffs are interested to the extent of one moiety or upwards in the said hereditaments :*

It is ordered that the said hereditaments be sold with the approbation of the judge:

And it is ordered that the money to arise from such sale be paid into court to the credit of this action (*h*):

But if it shall be certified that all parties interested are not parties to this action, then it is ordered that any of the parties interested are to be at liberty to apply to the judge at chambers for a sale of the said hereditaments when it shall have been certified that the persons who ought to be served with notice of this order have been so served, *and that the parties or party interested collectively or individually to the extent of one moiety or upwards in the said hereditaments request a sale :*

And it is ordered that the further consideration of this action be adjourned, and any of the parties are to be at liberty to apply as they should be advised.

The plaintiff must, of course, prove his title. Evidence.  
The court will not grant an inquiry in order to enable the plaintiff to complete his own title (*i*).

The only evidence necessary for the hearing in an unopposed case under the 4th section, where the plaintiff owns a moiety and requests a sale, unless he desires to dispense with the preliminary inquiries, is the proof of the instrument creating the joint tenancy, and a general affidavit concisely verifying the facts stated in the statement of claim, including the plaintiff's title.

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(*h*) *Scott v. Watson* (V.-C. Hall), 1876, S. 180; *Pemberton*, 2nd ed., p. 574; *Senior v. Hereford*, 4 Ch. Div. 494.

(*i*) *Jope v. Morshead*, 6 Beav. 213.

The defendant may resist a sale if he can show the court "good reason" against it, the onus lying on him.

In a contested case, therefore, evidence would be required to rebut the case made by the defendant.

Request by  
defendant.

We have seen that the defendant in a partition suit may request a sale, and that the court must grant it if the defendant owns a moiety or upwards of the property, unless the plaintiff can show good reason to the contrary.

Upon motion for a decree this day made unto this court by counsel for the plaintiffs, and upon hearing counsel for the defendant, and upon reading the answer of the defendant filed the 20th day of September, 1875, an affidavit of the plaintiffs filed the 22nd day of December, 1875, and the admissions dated the 4th day of January, 1876, signed by the solicitors for the plaintiffs and the defendant, and the documents therein referred to; and *the defendant by his counsel requesting a sale* of the hereditaments and premises in the bill mentioned devised by the will of the testator in the bill named, and a distribution of the proceeds instead of a division of the said hereditaments and premises between or among the parties interested, this court doth order that the following inquiries and accounts be made and taken, that is to say:—

1. An inquiry who are the several persons interested in the said hereditaments and premises, in what shares and proportions and for what estates and interests, and whether such persons are respectively parties to this cause.
- [2. An inquiry what incumbrances affect the entirety

of the said hereditaments or of any and what parts thereof.

3. An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.
4. An inquiry what are the priorities of such last-mentioned incumbrancers] (i).

And if it shall be certified that all persons entitled to the said hereditaments and premises are parties to this cause, *and that the defendant is interested to the extent of one moiety or upwards in the said hereditaments and premises:*

It is ordered that the said hereditaments and premises be sold, with the approbation of the judge, [free from the incumbrances (if any) of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent] (i): and it is ordered that the money to arise by the sale of the said hereditaments and premises be paid into court to the credit of this cause (*Meredith v. Hampden*, 1875, M. 175); [and if such money or any part thereof shall arise from real estate sold with the consent of incumbrancers, the money so arising be applied in the first place in payment of what shall appear to be due to such last-mentioned incumbrancers according to their priorities] (i). But in case it shall appear that any person interested in the hereditaments and premises or any part thereof are not parties to this cause, it is ordered that the plaintiffs be at liberty to apply to the judge in chambers for an order for sale after it shall have been certified that the persons so interested who are parties have been served with notice of this decree, and it is so ordered that the further consideration of this cause be adjourned, and any of the parties are at liberty to apply as they may be advised.

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(i) See observations post, p. 66.



It will be seen, from the language of the foregoing forms of order under the 4th section, that parties requesting a sale may have a conditional order for sale at the hearing, subject to proof of their title to a moiety or upwards of the property.

But if the parties requesting a sale should prove to have less than a moiety, then it will be necessary to come again to the court on further consideration and to show a case under the 3rd or 5th sections.

As to directing inquiry relating to incumbrances.

It is open to question whether the clauses relating to incumbrances, which we have distinguished by brackets in the last form, should be inserted except in special cases by the discretion of the court. If omitted, the inquiry as to the persons interested will still include all such incumbrancers as come in to prove their claims, and the others would be left to their ordinary remedies. There seems to be no adequate reason for specially protecting those incumbrancers who do not assert their claims; and, on the other hand, a very great burthen is cast on the plaintiff and other parties to a partition action, and serious expense and delay may be caused by special inquiries as to incumbrancers. For with such inquiries it will be necessary for the chief clerk to have an affidavit in respect of every share before he can make his certificate, or the sale proceed. If we suppose a case where some hundreds of shares exist, the owners of

which are scattered in various parts of the world, it is easy to see how expensive and fruitful of delay such a process must be. The same observations apply to an inquiry whether any of the parties have settled their shares.

In any case the chief clerk's certificate must be made before a sale can be proceeded with, as there is no power in the court to decree a sale until the court is satisfied that the parties whose interests are affected have had due notice or are protected. Therefore a sale made by anticipation before certificate in a partition suit of a portion of the property was set aside on the application of the purchaser to be discharged from his contract (*Powell v. Powell*) (j). Certificate must precede sale.

*Under 3rd Section.*

Here the parties requesting a sale own less than a moiety; the pleadings should show the circumstances which render a sale expedient rather than a partition. 3rd section.

We have treated of these circumstances above (vide page 34).

Evidence of the circumstances relied on should be given by the parties requesting a sale. Such parties may be either plaintiffs or defendants. The court will, at the hearing, decide on the weight to be given to the reasons for sale, and, if sufficient, will refer it to chambers to Evidence.

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(j) L. R., 10 Ch. App. 130.

inquire as to parties, subject to which inquiry the sale will proceed without coming back to the court.

**Form of order.** The plaintiffs [*or* defendants], by their counsel, requesting a sale of the lands and premises, situate, &c.; and it appearing to the court that by reason of the nature of the said property [*or* of the number of the parties alleged to be interested or presumptively interested therein, &c.] a sale of the property and a distribution of the proceeds will be more beneficial for all the parties interested than a division of the property between or among them, Let an inquiry be made who are the parties interested in the said lands and premises, and in what shares and proportions, and for what estates and interests. And if it shall be certified that all the parties entitled to or interested in the undivided shares in the said hereditaments are parties to this cause, and that ——— [*the parties requesting the sale*] are some of such parties, Let the said lands and premises be sold with the approbation of the judge. Directions for payment into court of purchase-money. But if it shall be certified that all the persons interested are not parties to this action, Let any of the persons interested be at liberty to apply to the judge at chambers for a sale of the said hereditaments when it shall have been certified that all persons who are not parties and who ought to be served with notice of this order have been so served. Adjourn further consideration. Liberty to apply (*k*).

*Under 5th Section.*

**5th section.** A case comes under the 5th section where a plaintiff requesting a sale has less than a moiety

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(*k*) See *Mildmay v. Quicke* (M. R.), L. R., 20 Eq. 537; *Drinkwater v. Ratcliffe*, L. R., 20 Eq. 528; Pemberton, 2nd ed., p. 574.

and is unable to convince the court of the necessity of a sale, or that a sale would be for the benefit of the majority of the parties interested. In such case the plaintiff must satisfy the court that hardship will be inflicted on him if he should be prevented from realizing the value of his share, and he should therefore direct his evidence to this question.

The court in such case may call on the defendants to undertake to purchase the plaintiff's share, or in default may order a sale.

The order in the latter event will be similar to the form of an order under the 3rd section, with the following recital:—

Upon motion, &c. made unto the court by counsel Form of order.  
for the plaintiffs, and upon hearing counsel for the  
defendants and reading, &c.:

And the plaintiffs who claim to be interested in one-seventh part of the hereditaments in the pleadings mentioned by their counsel requesting a sale thereof, and a distribution of the proceeds instead of a division of the said hereditaments between or among the parties interested:

And the defendants who claim to be interested in the remaining six-sevenths of the said hereditaments refusing to undertake to purchase the share of the plaintiffs at a valuation, and it appearing to the court that the plaintiff cannot otherwise realize the full value of his share by a sale thereof separated from the remaining shares of the said hereditaments, and the court in the exercise of its discretion, having regard to the circumstances aforesaid and to the nature of the property, considering it fit to grant the plaintiff's request for sale:

This court doth order that the following inquiries be made, that is to say—

An inquiry who are the parties interested [*&c. as under 3rd section*].

Undertaking  
to purchase.

In the event of the defendants giving an undertaking to purchase, the judgment may be in the following form:—

And the defendants W. G., G. G. and R. F., by their counsel, undertaking to purchase, and the plaintiffs, by their counsel, consenting to sell, the one-seventh share to which the plaintiffs are entitled of the messuages and lands situate, &c., and also the one-seventh share of the said premises to which the defendant J. L. is entitled at a valuation, Let a valuation be made in chambers of such shares respectively accordingly. And in case the said defendants W. G., G. G. shall require the same, Let an inquiry be made whether a good title can be made to the said shares respectively. And in case the said defendants shall not require such inquiry, or in case it shall appear that a good title can be made, Let the defendants W. G., G. G. and R. F., within ten days after the date of the chief clerk's certificate, pay to such persons as shall be certified to be entitled to receive the same the respective amounts of such valuation, and thereupon let the plaintiff and the defendant J. L., or such of them as shall be necessary, and all other necessary parties, execute a proper conveyance of the said shares respectively to the defendants W. G., G. G. and R. F. (such conveyance to be settled by the judge), and let the costs of such valuation be paid by the said W. G., G. G. and R. F. (such costs to be taxed, &c. in case the parties differ).

But it has been already shown (p. 44, ante) that the court cannot compel a plaintiff to sell

his share if he should refuse to do so; and it therefore follows, that if in such case the plaintiff is not considered to be entitled to a sale on one of the grounds mentioned in the 3rd section, he must elect either to have a partition or to have his action dismissed.

He may, however, claim to have a partition, which is his primary right, and in that case the usual partition decree will be made (*Williams v. Games*) (*l*). Partition may be claimed.

The following is the form of the usual judgment for partition, which is thus the last resort of a plaintiff to whom the court refuses a sale:—

This court doth order that an inquiry be made who are the parties entitled to the hereditaments in the pleadings mentioned, and in what respective shares or proportions, and for what respective estates and interests, [and whether any and which of such shares are subject to any and what settlement or incumbrance] (*m*): Form of judgment for partition.

And if it shall appear that all the parties entitled to or interested in the said shares and interests (*m*) [or the settlement thereof or incumbrances thereon respectively], are parties to this action, it is ordered that a partition be made in chambers of the said hereditaments between the several parties interested therein:

And it is ordered that the several portions of the said hereditaments which shall be allotted to the parties in respect of their respective shares and interests, be held by them in severalty according to such allot-

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(*l*) L. R., 10 Ch. App. 204.

(*m*) See observations ante, p. 66.

ments [and subject to the settlements and incumbrances, if any, affecting the same respectively] (*m*):

And it is ordered that the parties do execute mutual conveyances of the said allotments, such conveyances to be settled by the judge:

And it is ordered that all deeds and writings relating to the said hereditaments in the custody or power of any of the parties, be produced on oath before the judge as he shall direct:

And let such parts thereof as relate to the premises which shall be allotted to each of the said parties, be delivered to them respectively:

And it is ordered that such deeds and writings as relate to any part of the said hereditaments, which shall be allotted to one of the said parties jointly with other parts allotted to the others or other of them, be deposited with the clerk of records and writs until further order:

Liberty to apply (*n*).

Sale of part  
and partition  
of other part.

There is nothing to prevent the court from ordering a sale of part and a partition of other part of the same estate in the same action. This was done in the case of *Roebuck v. Chadebet* (*o*), both parties being willing; but whether this could be done adversely has not been decided, and may be doubted. The case of *Williams v. Games* (*p*) does not immediately bear on this point, but some of the observations may have an

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(*m*) See observations ante, p. 66.

(*n*) *Williams v. Games* (M. R.), February 20, 1874; Pemberton, 2nd ed., p. 575.

(*o*) L. R., 8 Eq. 127.

(*p*) L. R., 10 Ch. App. 204.

indirect application, and do not favour the opinion that the court could adversely order a part only of an estate to be sold and the rest partitioned.

On the other hand, it was said in *Storey v. Johnson*, and other cases, that the whole of an estate need not necessarily be partitioned under the old law. This must, however, mean that the court need not insist, for any party having an undivided share may claim a partition as of right.

It was frequently the case that the court refrained from extending the partition to the shares of those who did not desire separation (q). The case of a sale is, however, different; for a part of an estate will not always sell as well as the whole, and the statute of 1868 does not seem to contemplate the sale of a part only.

It was, however, argued in *Roebuck v. Chadebet* that two suits might be brought, one for partition, the other for sale; and, therefore, it may be in the power of a plaintiff, if not of a defendant, to arrange the proceedings as to give the court power to direct a sale of one part and partition of another part of a large and complex property.

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(q) *Hobson v. Sherwood*, 4 Beav. 184.



*Liberty to bid (Sixth Sect.).*

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6. AUTHORITY for Parties interested to bid.]—

*On any sale under this act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to nonpayment of deposit, or as to setting off or accounting for the purchase-money or any part thereof, instead of paying the same, or as to any other matters, as to the court seem reasonable.*

Analogy to  
partnership.

The practice as to the conduct of the sale under a judgment or order in a partition suit is analogous to that adopted in sales in suits for dissolution of partnership, of the partnership property.

It is both beneficial and right that each co-owner of property sold under the Partition Act should have leave to bid—on the one hand, the greater the number of bidders the better the sale, and, on the other hand, no person has a better right to try to become the purchaser than one whose share in the property has been forcibly converted for the general benefit.

Conduct of the  
sale.

The plaintiff usually has the conduct of the sale, and, if he desires to bid, it is apprehended

that the proper course is that adopted in the case of *Rowlands v. Evans* (a), where, in a suit for dissolution of partnership, both parties were allowed to bid, and the conduct of the sale was given to an indifferent person.

And it is ordered that [ ] be sold, with the approbation of the judge, by a person to be appointed by the said judge for that purpose.

Where all parties to the action have liberty to bid, a solicitor not concerned for any of them to be mutually agreed on, or in default of agreement to be nominated by the judge, will be appointed to conduct the sale (b). Solicitor appointed to conduct the sale.

In *Pennington v. Dalbiac* (c), V.-C. Malins Exception. allowed the plaintiffs to bid although they had the conduct of the sale, and although there were absent parties and parties under disability. In that case no objection was raised, and the Vice-Chancellor, without wishing to break in upon the general rule, thought it a peculiar case. It would not follow, however, in any similar case, that the purchaser might not take an objection after the sale, or that some of the absent parties might not apply to invalidate the sale, if the plaintiffs became the purchasers.

If a party to the action, who is interested in Deposit.

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(a) 30 Beav. 302.

(b) Vide Daniell's Ch. Pr., 5th ed. 1158.

(c) 18 W. R. 684.

the property sold to the extent of upwards of one-tenth share, should also become the purchaser of the estate, it would be manifestly just in the majority of cases to dispense with the usual deposit of 10 per cent. usually made by purchasers on account of the purchase-money, and this the court has power to do under the 6th section.

Retention of  
part of pur-  
chase-money.

It is equally just that such a purchaser should be allowed to set the value of his own share against the purchase-money payable for the whole estate, and only pay into court the difference. The Master of the Rolls made an order to this effect in the case of *Wilkinson v. Joberns (d)*. In that case the defendant, owning half the estate, was the purchaser, and he was only required to pay a moiety of the purchase-money into court.

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(d) L. R., 16 Eq. 14.

### *Absent Parties.*

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THE court will not direct a sale without having all persons interested in the freehold of the estate before it.

But in order to avoid injustice to persons having absent persons for their co-owners, various provisions have been made by the Acts 1868 and 1876 for enabling the parties who are present, and desire to insist on their rights, to obtain a partition or sale in spite of the absence of their co-owners. Owners out of jurisdiction.

The same provisions apply in cases where the parties, although not out of the jurisdiction, are either unknown or so numerous that they cannot be personally served without an expense disproportionate to the value of the property. Numerous or unknown.

The 9th sect. of the Partition Act, 1868, is as follows:—

9. Parties to Partition Suits.]—*Any person who, if this act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for* 9th section.

Inquiries.

*want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the court to add to the decree or order.*

Service of decree or order.

The above quoted provision is supplemented by the 3rd sect. of the Partition Act, 1876—

3rd sect. Partition Act, 1876.

3. Power to dispense with Service of Notice of Decree or Order in Special Cases.]—*Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the court may if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent*

*or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.*

Advertisements instead of service in certain cases.

Application of Trustee Act, 1850, to absent parties.

4. Proceedings where Service is dispensed with.]—Where an order is made under this act dispensing with service of notice on any person or

Proceeds of sale.

*class of persons, and property is sold by order of the court, the following provisions shall have effect:—*

Payment into court.

- (1.) *The proceeds of sale shall be paid into court to abide the further order of the court:*

Time for distribution to be fixed.

- (2.) *The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:*

Notice of sale having taken place.

- (3.) *The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made:*

Distribution of proceeds.

- (4.) *If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons:*

Where all parties have not been ascertained.

- (5.) *If at the expiration of the time so fixed or extended the interests of all the persons*

*interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with such reservations (if any) as to the court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any primâ facie rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.*

Exclusion from participation.



Form of judgment under 9th section.

The following is a form of judgment under the 9th section of the original act :—

Let an inquiry be made who are the persons respectively entitled to the lands and hereditaments in the pleadings mentioned, and for what estates and interests respectively, and in what shares and proportions, and whether they or any and which of them are parties to this action.

Presumption of death without issue after seventeen years.

In the case of *Rawlinson v. Miller* (a), V.-C. Malins presumed an owner of an undivided sixth share, who had not been heard of for seventeen years, to have died without issue, and the Vice-Chancellor held the purchaser bound to accept the title.

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(a) L. R., 1 Ch. D. 52.

### *Application of the Trustee Act, 1850.*

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7. APPLICATION of Trustee Act.]—*Section thirty of the Trustee Act, 1850, shall extend and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property.*

The object of the incorporation of the 30th section of the Trustee Act into the Partition Act, 1868, is to render possible a conveyance of the legal estate in every case where the court shall have directed a sale of land under the powers of the latter act. Object of section,

It is clear that, in any case where the court has jurisdiction to make judgment or order for sale, such order binds in equity the interests of all persons, whether or not they are in existence; but, without the aid of the Trustee Act, in many cases, no conveyance of the legal estate could be made to the equitable owner. to bind legal estate;

The effect of the powers of that act is to bind the legal estate. The 30th section enacts, that where any decree (now judgment) shall be made by any court of equity for partition of lands, it shall be lawful for the court to declare any of the parties to be trustees within the meaning of the act, or to declare concerning the interests

of unborn persons who might claim under any party to the suit, or under the will or voluntary settlement of any person deceased, who was, during his lifetime, a party to the transactions concerning which such decree is made,—that such interests of unborn persons are the interests of persons who, on coming into existence, would be trustees within the meaning of the act.

to effect a  
severance of  
estate.

The effect of such declaration is to make the beneficial ownership of such co-owner recede from those parts of the land awarded to others and become concentrated on the share awarded to him, so that he is by operation of law transformed from an owner in his own right of an undivided share in the whole property into an exclusive owner in his own right of a part only, and a bare trustee for his co-owners of an undivided share in the remainder of the property.

Power to make  
vesting order  
or appoint  
person to  
convey.

If, therefore, any owner so declared to be a trustee is under disability or is absent or refuses to convey, the previous clauses of the Trustee Act will come into operation, by virtue of which the court has power either to make a vesting order in favour of or to appoint a person to convey the estate of the trustee to the person or persons beneficially entitled under the partition.

In case of sale,  
trust for pur-  
chaser.

In case of a sale being ordered under the Partition Act, 1868, the trust created by the decree or judgment of the court will be in favour of the purchaser instead of the co-owners of the

property. And the court will make an order vesting the estate of the trustee so constituted in the purchaser, or will appoint a person to convey such estate to the purchaser on his behalf.

It will be seen from what has been said, that, although the 30th section of the Trustee Act is alone mentioned, yet that many other sections of that act are, in fact, imported into the Partition Act—more especially the following:—

Other sections  
of Trustee Act.

Sects. 3 and 4, conferring power on the Lord Chancellor to make vesting orders, having the effect of a conveyance or release of lands or contingent rights in land held or possessed by lunatics or persons of unsound mind upon any trust.

Sects. 7 and 8. The like power to the Court of Chancery in the case of infant trustees.

Sects. 9, 10, 11 and 12. The like power to the Court of Chancery in the case of trustees who are out of the jurisdiction of the court or cannot be found.

Sect. 13. The like power in the case of two or more trustees who shall have died, where it is uncertain which was the survivor.

Sect. 14. The like where it is uncertain if the last trustee be living or dead.

Sect. 15. The like where the trustee dies without an heir.

Sect. 16. The like where lands are subject to

a contingent right in unborn persons or classes of persons who, upon coming into existence, would become seised of such lands or any trust.

Sect. 20. Power for the Court of Chancery to appoint a person to convey instead of making a vesting order in many cases authorized by the act.

Sect. 28. Provision as to the effect of a vesting order in the case of copyholds.

Sect. 44. Provision in favour of purchasers as to the legal validity of vesting orders of trust estates, with saving clauses in favour of the jurisdiction of the court to revise its order and to award costs (a).

Trustee Ex-  
tension Act.

Sect. 2 of the Trustee Extension Act, 1852 (b), provides for the case of a trustee refusing or neglecting to convey after demand from a person beneficially entitled (c).

Extension by  
Partition Act,  
1876.

By the 3rd section of the Partition Act, 1876, the powers of the court, under the Trustee Act, 1850, are declared to extend to the interests of persons advertised for under the powers of that

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(a) Vide Appendix, p. 132, where the clauses of the act are set out *in extenso*.

(b) 15 & 16 Vict. c. 55.

(c) The person appointed to convey the property may execute the deed prepared in the name of the trustee, and in that case it should be expressed in the attestation clause that he has executed in place of the other by virtue of the order of the court. *Ex parte Foley*, 8 Sim. 395.

section, and who shall not have come in and established their claims, as if they had been parties to the action.

This is an important and necessary extension of the powers of the court, for it will be observed that the 30th section of the Trustee Act only applied to persons who were parties to the suit; and although the 9th section of the Partition Act declared that persons served with the decree should be deemed parties to the suit, yet there was no provision in the case of persons who could not be found, and who were not parties.

The following may serve as an example of the application of the provisions of the Trustee Act, 1850, to cases of sale under the Partition Act. Example of application.

*Lees v. Coulton* (*d*) was a partition suit, praying a sale. The real estate in question was of great value, the persons interested very numerous, and their titles complicated under the limitations of a portion of the estate; unborn issue might become entitled; all the persons in existence were parties to the suit. The Master of the Rolls (Sir G. Jessel) considering the title proved, granted an immediate decree for sale, and declared that unborn issue coming into existence would be trustees of their respective interests, but he declined to appoint a new trustee in their place at once. An application for that purpose

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(*d*) L. R., 20 Eq. 20.

was directed to be made after the order should have been drawn up.

**Form of order.** *Form of Order.*—Declare that the several parties to this cause are trustees within the meaning of the Trustee Act, 1850, of their respective shares and interests in said lands within the meaning of the Trustee Act, 1850, and that the several interests of all unborn persons who may claim under the will of J. L., the father, in the bill named, are the interests of persons who, upon coming into existence, will be trustees within the meaning of the said act.

Unborn  
persons and  
unascertained  
persons.

As to the meaning of “unborn persons” in the 30th section of the Trustee Act, the Master of the Rolls decided, in the case of *Basnett v. Moxon (e)*, that those words extended to persons (such as the heir-at-law of a living person) who, although in existence, were not yet ascertained, or had not acquired the character necessary to entitle them to the estate intended to be affected. “The object was to enable the court to convey a future legal estate devolving on a person who could not be made a party to the suit.”

Effect of  
Trustee Act  
on rights of  
infants.

The powers of the Trustee Act have been explained in their operation upon the practice, but an important legal effect upon the rights of infants remains to be noticed.

Day to show  
cause abo-  
lished.

Formerly, no decree could be made against an infant without giving him a day to show cause after coming of age, and in cases of partition no

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(e) L. R., 20 Eq. 182.

conveyances could be executed until after that date (*f*). Even in cases where the infant was plaintiff sometimes the same rule prevailed (*g*).

The incorporation of the Trustee Act with the Partition Acts now empowers the court, instead of giving the infant a day to show cause, to declare him a trustee of the parts allotted in severalty to the other parties, with the effect of binding his estate as if he were adult (*h*).

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(*f*) *Brooke v. Hertford*, 2 P. Wms. 518; *Tuckfield v. Buller*, Ambler, 197.

(*g*) *Effingham v. Napier*, 2 P. Wms. 401.

(*h*) *Bowra v. Wright*. 4 De G. & Smale, 265.



### *Application of Settled Estates Act.*

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8. APPLICATION of Proceeds of Sale.]—*Sections twenty-three to twenty-five (both inclusive) of the act of the session of the nineteenth and twentieth years of her Majesty's reign (chapter one hundred and twenty), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this act.*

This provision is a necessary complement of the powers of sale conferred by the act.

Application of  
proceeds.

Sections 23 and 24 of the Settled Estates Act provide that the purchase-money received on any sale under the act should be paid to any trustees of whom the court may approve, or otherwise be paid into court, and in either case should be applied to some one or more of the following purposes:—

Redemption of  
land tax, or  
discharge of  
incumbrances.

1. The redemption of land tax or the discharge of any incumbrances affecting the hereditaments in respect of which the money was paid, or other hereditaments subject to the same uses and trusts;

Purchase of  
land.

2. The purchase of other hereditaments, to be settled in the same manner as the heredi-

taments in respect of which the money was paid; or

3. The payment to any person becoming absolutely entitled. Payment to person entitled.

Section 25 provides that, until applied for some Investment. or one of the purposes aforesaid, the purchase-money shall be invested in exchequer bills or three per cent. bank annuities, and the interest or dividends paid to the person who would have been entitled to the rents and profits of the land if the purchase-money had been invested in land (a).

The incorporation of these sections from the Equity for re-conversion. Settled Estates Act has the effect of creating an equity for re-conversion of the purchase-money into land, in the case of sale of the property of infants or persons under disability, by virtue of the powers of the Partition Act (*Foster v. Foster*) (b).

As to the securities authorized by sect. 25, Proceeds of sale not cash under the control of the court. there is some conflict of judicial opinion whether the category is to be held as having been enlarged by sect. 10 of 23 & 24 Vict. c. 38, and the rules thereunder, for investment in Bank Stock, East India Stock, £2 : 10s. per Cent. Annuities, mortgage of freehold and copyhold estates in England and Wales, Reduced £3 per Cent. and New £3

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(a) Vide Appendix, p. 138.

(b) L. R., 1 Ch. D. 588.

per Cent. Annuities. Vice-Chancellors Malins and Hall are of opinion that it is so enlarged. The Master of the Rolls, however, considers himself bound to the contrary opinion by a decision of Lord Selborne (c).

Payment to  
trustee.

As to the power contained in the 23rd section to order payment to trustees, it is evident that it is only intended to apply to cases where the money has to be reinvested, and that the court will exercise a discretion as to the persons to be so entrusted, and the circumstances of the case. In *Aston v. Meredith* (d), V.-C. Bacon refused to order payment to a sole surviving trustee, by him to be divided amongst the persons entitled.

Infant not a  
ward of court.

It would seem that the mere payment of an infant's money into court, under the provisions of the Settled Estates Act, will not constitute an infant a ward of court (e).

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(c) *Re Taddy*, L. R., 16 Eq. 533; *Re Fryer*, L. R., 20 Eq. 469; *Langmead v. Cockerton*, W. N. 1877, p. 43.

(d) L. R., 13 Eq. 492; see post, p. 107.

(e) *Re Hodges*, 3 K. & J. 213; *Re Hilary*, 2 Dr. & Sm. 461.

### *Leading Cases.*

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THE following brief account of the principal reported cases which have been brought before the court under the Partition Act, 1868, may be useful to the practitioner.

*Lys v. Lys* (a) was one of the first cases which came before the court under the Act of 1868. The bill had been filed before the act was passed, and had prayed for a partition or a sale if beneficial to the infant plaintiff in the opinion of the court. The defendant resisted a sale. The court held the operation of the Act of 1868 to be retrospective, and to apply to partition suits instituted before the passing of the acts. The Vice-Chancellor Giffard said that a sale ought not to be directed without giving the defendants an opportunity of filing affidavits for the purpose of showing that a sale would be injurious to them. The cause stood over for that purpose, and the defendants failing to satisfy the court on the occasion of its again coming on that any reason existed against a sale, the court ordered a sale under

*Lys v. Lys.*  
Retrospective  
operation of  
act.  
Under 4th  
section.

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(a) L. R., 7 Eq. 127.

the 4th section on the request of the plaintiffs owning a moiety of the estate.

*Pryor v.  
Pryor.*

Decree for partition once made cannot be disturbed and sale ordered instead.

*Pryor v. Pryor* (b) was a case of a bill filed and decree made for partition under the old law before the Partition Act, 1868. Some of the parties desired a sale, and applied by supplemental bill for a sale. The Court of Appeal refused the application, Lord Justice James saying, "I do not think we can alter the decree. In a partition suit no doubt the court has now power to order a sale, but in this case there is a decree in existence. Every party to the suit had under the decree a right to have a commission, and I do not think this act of parliament has taken away that right."

*Lees v.  
Coulton.*

Decree for sale at hearing.

Trustee Act,  
1850.

In *Lees v. Coulton* (c), a decree for sale was made at the hearing, the title having been proved by affidavit. The Master of the Rolls said that, as the title had been proved at great expense, an immediate decree for sale would be made, and that there would be a declaration that the parties to the suit were, and that unborn issue upon coming into existence would be, trustees of their respective interests; but that as they could only be constituted trustees by the order, it seemed to him to be going too far to appoint a new trustee in their place at once, and that it would be better to make an application for that purpose after the order was drawn up.

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(b) L. R., 19 Eq. 595; and on appeal, 10 Ch. App. 469.

(c) L. R., 20 Eq. 20.

The minutes were as follows :—

Declare that the several parties to this cause are trustees within the meaning of the Trustee Act, 1850, of their respective shares and interests in the several estates hereby directed to be sold; and that the interest in such several estates of all unborn persons who might claim under the will of J. L., in the bill named, are the interests of persons who, upon coming into existence, will be trustees within the meaning of the said act.

In *Roebuck v. Chadebet* (d), the bill was for partition, and counsel at the hearing asked for a sale of a part, and a partition of the remainder of the estate. Counsel observed that two bills might have been filed, one praying for partition of the part of the property sought to be partitioned, and the other praying for a sale of the part sought to be sold, and in that case the court would have jurisdiction to make decrees according to the prayers of the two bills; and that being so, he submitted the same thing ought to be done on one bill. There was no opposition, and the Master of the Rolls made the decree, as asked, in the following form :—

*Roebuck v.  
Chadebet.*  
Partition of  
part, sale of  
the rest.  
Under 3rd  
section.  
Title of parties  
proved.  
Trustee Act,  
1850.

Declare that each of the plaintiffs is entitled to a sixth, &c. And the plaintiffs and the defendant E. C., by their counsel respectively, desiring that a partition should be made of such parts only of the said hereditaments as are comprised in the first schedule to the affidavit of J. L., and that the hereditaments comprised in the second and third schedules to the said affidavit,

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(d) L. R., 8 Eq. 127.

being the remaining parts of the said copyhold hereditaments, should be sold; and the court being of opinion that a sale of the said hereditaments comprised in the said second and third schedules, and a distribution of the proceeds, will be more beneficial to the infant defendant than a partition of the said premises: Let a partition of the hereditaments comprised in the said first schedule be made by the judge in chambers. Directions for allotment of the respective sixths. Let the plaintiffs and defendants respectively hold and enjoy their respective shares in severalty, according to such allotments. Declare that the infant defendant B. is a trustee within the meaning of the Trustee Act, 1850. Appoint J. B. to surrender and assure, &c. Mutual surrenders and assurances to be executed. Let the hereditaments comprised in the second and third schedules be sold with the approbation of the judge, and the money to arise by sale paid into court to the credit of the cause. Declare, that upon such payment the infant defendant will be a trustee of her undivided sixth of the hereditaments comprised in the said second and third schedules, within the meaning of the Trustee Act, 1850. Let J. B. be appointed to surrender and assure the same on her behalf. Liberty to apply in chambers for payment of costs of suit out of proceeds of sale, and for distribution of said proceeds, and generally (e).

*Mildmay v.  
Quicke.*  
Order for sale  
at hearing.  
Parties.

In *Mildmay v. Quicke* (f), the plaintiff asked for a decree at the hearing, directing an inquiry as to what parties were entitled to or interested in the property; and if it should be certified that all the parties entitled to or interested in the pro-

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(e) Vide Pemberton on Judgments, 2nd ed. 566.

(f) L. R., 20 Eq. 537.

perty were parties to the suit, or had been served with notice of the decree, then for a sale according to the form in *Harper v. Bird* (*g*) (*Powell v. Powell* quoted). The Master of the Rolls said: "That if all parties interested were parties to the cause, a decree for sale might be made at the hearing; but if they were not all parties, then the 9th section of the Partition Act, 1868, applied, and a sale could only be ordered on further consideration. It might be that these words were not used in their strict technical sense; but before a sale could be ordered, there must be further consideration of some sort or other, and the utmost that could be done in such a case would be to give liberty to apply at chambers, with reference to a sale, in the event of its being certified that all parties interested have been parties to the cause, or had been served with notice of the decree."

In *Wilkinson v. Joberns* (*h*), Lord Selborne, Lord Chancellor (sitting for the Master of the Rolls), after directing a sale under section 4 of the Partition Act, 1868, in opposition to the desire of the owner of a moiety of the estate, who was also a tenant of the whole, granted the defendant leave to bid, and directed that in the event of his becoming the purchaser he should

*Wilkinson v.  
Joberns.*  
Leave to bid.

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(*g*) Before Vice-Chancellor Hall, 17th April, 1875.

(*h*) L. R., 16 Eq. 14.



pay into court one moiety only of the purchase-money.

*Powell v.  
Powell.*

Practice.

Sale had before  
certificate of  
chief clerk.

In *Powell v. Powell* (i), the court discharged a purchaser under a decree for sale in a partition suit, because the sale had taken place before the chief clerk had made his certificate. The decree had directed three classes of inquiries, viz., 1, as to persons entitled and their several interests, and whether they were parties or had been served; 2, as to parties out of the jurisdiction; 3, as to the expediency of sale under the 3rd section of the act.

The chief clerk directed a sale of a portion of the property by anticipation before he had made his certificate. The purchaser objected to the title, alleging that the defect was not cured by a subsequent certificate. Lord Chancellor Cairns remarked: "There are two matters in which the mind of the judge is to be exercised, first, who are the parties interested; and secondly (a question which cannot be properly determined till they are present), whether a sale will be more beneficial to them than a partition. Here a sale was directed in chambers before the judge had his mind brought to these questions. In reply to this it is urged that a certificate has since been made finding that the proper parties are before the court and that a sale is beneficial; but surely

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(i) L. R., 10 Ch. App. 130.

it is not a proper course of proceeding for a sale to be made before the judge has found who are the parties interested, and that a sale is beneficial to them, and for this irregular order to be afterwards confirmed, when the materials without which it ought not to have been made have been obtained."

In another part of the same case, the Lord Chancellor put a construction on the words "further consideration" as used in the 9th section of the Partition Act, 1868. He said: "I do not think that it was the intention of the legislature, in using in the 9th section the words 'on further consideration,' to tie up the court so as to preclude its ordering a sale otherwise than when the cause comes on for further consideration in court. I should take the words in a popular sense, as referring to any consideration the cause receives after the inquiries have been made."

Meaning of the expression further consideration in act.

In *Grove v. Comyn* (*k*), a provisional agreement for sale, made by the plaintiff before the hearing, was sanctioned by the court and directed to be confirmed and carried into effect. The minutes were as follows:—

*Grove v. Comyn.*  
Request for sale by infant.

"Declare that the piece of ground at N. in the bill mentioned is divisible between the plaintiff and defendant in equal moieties (subject to town, &c.), and it appearing to the court that by reason of the nature of the property a sale of the said property and a distribu-

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(*k*) L. R., 18 Eq. 387.

tion of the proceeds of the sale will be more beneficial to the parties interested than a division thereof between or amongst them, and the infant plaintiff requesting that the said hereditaments may be sold; and the court being of opinion that the conditional agreement, dated, &c., in this bill mentioned, is a proper agreement for carrying such sale into effect, doth order that the said conditional agreement entered into between, &c., for the sale of the said piece of ground, situate, &c., at the price of 1,100*l.*, be carried into effect. And it is ordered that the money to arise by such sale be paid into court to the credit of this cause, and any party to be at liberty to apply in chambers as they might be advised."

It will be observed that the court here acted on the request of an infant before the Act of 1876, but there was no opposition, and the question as to sufficiency of title would still remain open to a purchaser.

*Halfhide v.  
Robinson.*

Person of un-  
sound mind  
cannot sue by  
next friend.

In *Halfhide v. Robinson* (1), where a bill had been filed for partition of real estate on behalf of a person of unsound mind, the court objected that there was no authority for such a suit. Lord Justice James observed: "I think that this suit is altogether irregular. Such a bill ought not to have been filed by a next friend on behalf of a person of unsound mind not so found by inquisition. It is said that it is a mere matter of form, for that if the parties were transposed and the person of unsound mind made a defendant, there

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(1) L. R., 9 Ch. App. 373.

must have been a decree for sale just the same as has now been made. But in that case the plaintiff would have taken the risk of the costs of the suit. However, we can apply our powers under the Lunacy Regulation Act (*m*) to the case. We shall be exercising our power of selling the lunatic's property on terms which we think beneficial to the lunatic, but not under this suit nor adopting the proceedings under it in any way. A petition must be presented under the Lunacy Regulation Act, or, if the petitioners prefer it, they may amend their petition and make it under that act, and they must state what is the total value of the lunatic's property. The matter will be dealt with in lunacy, and we must be informed of the exact sum which will come to the lunatic under the sale after providing for the costs which her share will have to bear, and we shall be able to concur with the other parties in carrying out the sale. I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition for dealing with his real estate. The consequences of such a course might be monstrous."

Since this decision the 6th section of the Partition Act, 1876, has given power to the court to act on a "*request*" for sale under it, made on behalf of a person of unsound mind; but the act

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(*m*) 25 & 26 Vict. c. 86, ss. 12, 13; applicable to cases where property does not amount to 1,000*l*.

does not in terms authorize an action to be commenced on his behalf by a next friend; therefore it is presumed, that the foregoing observations of Lord Justice James will still apply to future cases.

*Hurry v.*

*Hurry.*

Absent party.

Under 4th section.

In *Hurry v. Hurry* (*n*) the court refused to order a sale in the absence of a party (although owning a very small share) who had not been served. The chief clerk had certified that one of the defendants was out of the jurisdiction. It was believed he was in Australia; no attempt had been made to serve him. His share was one-ninth of one-fifth only, and it was submitted that, as all parties present asked for a sale, the court could proceed in his absence under the 4th section. The Vice-Chancellor, however, considered that he could not order a sale in the absence of the defendant in question, and ordered the cause to stand over.

*Peters v.*

*Bacon.*

Absent parties.

Under 3rd section.

In *Peters v. Bacon* (*o*), forty persons resident in England were interested, besides a family of children resident abroad. The property consisted of three leasehold houses. A bill was filed by nine of the persons interested resident in this country against six others also resident in this country. The Master of the Rolls made a decree, dated Jan. 30, 1869, whereby, after reciting that

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(*n*) L. R., 10 Eq. 346.

(*o*) L. R., 8 Eq. 125.

his lordship was of opinion that, having regard to the number of persons interested in the houses, a sale of the same and a distribution of the proceeds would be more beneficial than a partition among them, and the plaintiffs requested that the premises should be sold, his lordship ordered a sale with the usual directions.

The plaintiffs afterwards took out a summons in chambers for the purpose of obtaining an order that notice of the decree and of the order to be made on the summons by advertisement in certain papers might be deemed good service on the children resident abroad (in California), or that direction might be given for service of the decree, and that the sale might be proceeded with pending such service. Lord Romilly, M. R., said: "I cannot allow you to proceed in the absence of these parties, but I can give you leave to give them notice of the decree by advertisement, and after the advertisements have appeared, if they do not come in, you may have liberty to apply as to proceeding with the sale. It had better go to chambers for the chief clerk to settle the advertisement and the papers, and the number of times they are to appear."

Now, the new powers given by the Act of 1876 will apply to a case of this nature (*o*).

It has been already stated that a tenant in

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(*o*) Vide ante, pp. 79—81.

reversion or remainder of an undivided share cannot sue for a partition.

*Evans v. Bagshaw.*  
Reversioner not entitled to maintain a suit for partition.

In *Evans v. Bagshaw* (*p*) it was held, that a plaintiff, being a reversioner, could not maintain a suit by reason of his having acquired an estate in possession since the filing of his bill. He had amended his bill by stating the new acquisition, but the Master of the Rolls dismissed the bill with costs, observing that as the plaintiff had no power to institute the suit, he could not, by afterwards acquiring an interest in possession, set up a title which he had not originally.

This decision was upheld on appeal, Lord Hatherley observing: "The case falls within the ordinary rule that the court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense in not allowing the reversioner to disturb the existing state of things. There might be a tenant for life of the whole and several tenants in common in reversion, in which case the inconvenience would obviously be very great. At all events the rule is unquestionably settled." Lord Justice Giffard: "The plaintiff should have dismissed his bill and filed a new one." Appeal dismissed, with costs.

We have seen (*q*) that an action for partition

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(*p*) L. R., 8 Eq. 469; and 5 Ch. App. 340.

(*q*) Ante, p. 12.

cannot, without leave of the court, be joined with an action for the recovery of land, or, in other words, that a disputed title cannot be tried in a partition suit.

In *Slade v. Barlow* (r), the plaintiff claiming to be equally entitled to an undivided share in a freehold estate, filed a bill for partition, raising a question of construction of a will, whether the estate had passed under a specific or residuary devise. It was objected at the hearing, that that was an ejectment bill. The Vice-Chancellor James said, that it appeared to him to be an attempt, under colour of a partition suit, to get a construction of a will against a defendant in possession of the property. Seeing that the real object of the suit was to recover the possession of land under a legal title, it would be straining the (John Rolt's) Act very far to say that these questions could be determined by the Court of Chancery.

*Slade v. Barlow.*  
Ejectment can not be joined with partition without leave of court.  
Bill retained for a year.

The suit for a partition is based on the assumption that there is no litigation. Following *Bolton v. Bolton*, the Vice-Chancellor directed the bill to be retained for a year, with liberty to the plaintiffs to bring such action at law as they might be advised.

*Giffard v. Williams* (s) was a similar case. The

*Giffard v. Williams.*

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(r) L. R., 7 Eq. 296.

(s) L. R., 8 Eq. 494; on appeal, 5 Ch. App. 546.



Vice-Chancellor Stuart had made an order declaring the legal title of the plaintiffs against the defendants, and decreeing a partition upon appeal. Lord Hatherley, L. C. (reversing the judgment of the Vice-Chancellor), said: "It would not be proper for this court, under colour of making a decree for partition, in fact to decide the legal right to this land."

"The order would be to retain the bill for a year, with liberty to the plaintiffs to bring such actions as they might be advised."

*Burt v.  
Hellyar.*  
Construction  
of will in  
partition suit  
by consent.

*Burt v. Hellyar* (t) was a case before Vice-Chancellor Wickens, where the plaintiffs brought a suit for a partition against a defendant in possession who claimed the whole estate. The question to be argued was one on the construction of a will, whether the plaintiffs and defendant were entitled in severalty, or whether the defendant was solely entitled to the estate. The Vice-Chancellor decided in favour of the plaintiffs, and decreed a partition, saying: "I may observe that the question I have decided is one of law and not of equity, and that a partition suit being an exercise by the court of administrative rather than contentious jurisdiction, it might not have been right that I should have dealt with it if anyone objected. But no one did object, in fact, and I think that under the circumstances I did not go beyond the limits of my proper jurisdic-

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(t) L. R., 14 Eq. 160.

tion, and that I do what is best for the parties by now deciding the case. It will be proper, however, to preface the decree with a statement of the desire of all parties, other than the infant, that the questions should be decided here and now."

In *Aston v. Meredith* (*u*), at the hearing on first further consideration, a sale was directed.

*Aston v. Meredith.*  
Payment to trustee under Settled Estates Act refused.

The property having been sold and the purchase-money paid into court, the cause came on for hearing on second further consideration. The property was divisible into thirteenths, and infants and married women were entitled. The plaintiffs asked that the fund in court, which amounted to 12,500*l.*, with the exception of the infant's share, might, under sect. 23 of the Leases and Sales of Settled Estates Act, be paid unto the plaintiff the surviving trustee, to be paid by him to the persons entitled, to avoid the delay or expense of powers of attorney from Australia. The Vice-Chancellor, however, refused the application, and ordered the fund to be paid out to the persons entitled in the usual manner.

In *Bailey v. Hobson* (*x*), where a decree for sale had been made in a partition suit, the court refused to grant an injunction to restrain the defendant, an owner of one-sixth, who happened

*Bailey v. Hobson.*  
Injunction against occupying tenant refused.

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(*u*) L. R., 13 Eq. 492.

(*x*) L. R., 5 Ch. App. 180.

to be in possession of the estate (without a lease from his co-owners), from selling and removing hay and turnips off the land.

Vice-Chancellor Stuart had granted the injunction prayed for, on the ground that the act was an interference with the process of the court; but Lord Justice Giffard reversed his decision, on the ground that there was no waste or destruction of the property, and as there was no tenancy the selling of the hay and turnips was what the defendant as a tenant in common had a perfect right to do, and was no tort.

### *Costs.*

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10. Costs in Partition Suits.]—*In a suit for partition, the court may make such order as it thinks just respecting costs up to the time of the hearing.*

This enactment was made in consequence of the previously existing rule, as to the incidence of costs in partition suits, which frequently occasioned hardship.

The earliest case in the books is that of *Parker v. Gerard* (a), where a case of *Nevis v. Levine* is quoted for the proposition, that the costs of a particular suit must be borne equally by a plaintiff and defendant. The plaintiff, in the latter case, was entitled to 300 or 400 acres, and the defendant to four or five only; and the defendant would rather have given up his part than be at the expense of a partition, yet it was decreed, and to be at the equal expense of both parties. In each of these cases it is, however, to be observed, there was but one plaintiff and one defendant.

In *Calmady v. Calmady* (b), the bill was filed

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(a) Ambler, 236.

(b) 2 Ves. jun. 568.

*Parker v. Gerard.*  
Costs to be borne equally.

*Calmady v. Calmady.*

Costs of commission borne by the estate.

for a commission to make partition of an estate, in which the plaintiffs claiming under the trusts of the marriage settlement of Admiral Calmady were interested as to two-thirds, and the defendant, an infant, was entitled to one-third. In order to show in what proportions the parties were entitled, it was necessary to investigate and make out the title, to show that incumbrances had been discharged, and to make a survey and valuation of the estate. In the course of these proceedings bills of revivor and supplement were filed, and a considerable expense incurred. The decree directed the commission to issue; but a question arose as to the costs, upon which a motion was made on each side to vary the minutes: the object of that for the plaintiffs was, that the costs of all the proceedings should be defrayed by the parties in moieties. The defendant insisted that the court should give no direction as to the costs; but if any costs ought to be given, they ought to be the costs of executing the commission only, and in proportion to the interests in the estate. Cases were cited on both sides showing considerable diversity of practice, the Lord Chancellor (Lord Hardwicke) said:—"This was not much discussed when it was formerly before me, but a very little time before it came on there was another cause, in which costs were asked upon a partition, which led me to consider it. I

found, not all the cases that have been now cited, but a good many authorities, in which, of late, the costs of the commission had been given. I was led to consider whence that variation of the practice had taken place, and I approved of the latter practice; for all the arguments against are, in truth, arguments against the jurisdiction of the court upon a bill for partition. A party choosing to have a partition has the law open to him; there is no equity for it, but the jurisdiction of the court obtained a principle upon convenience. Then the only question is, whether the legal mode of proceeding is so convenient as the means this court affords to settle the interests between them with perfect fairness and equality. It is evident the commission is much more convenient than the writ—the valuations of the proportions is much more considered, the interests of all the parties are much better attended to, and it is a work carried on for the common benefit of both; therefore it is just that both should pay, but not equally; their interests in the common fund must give the rule. They receive benefit exactly in proportion to the interests they have. But I do not find that, in any case, the court goes farther than in directing the costs of issuing and executing the commission; and there being no costs at all at law, as far as regards the suit here, the court will leave them to sustain such costs as

their interests in that suit necessarily put them to. The idea has been to make them pay as far as they have interest. It has been carried, upon sufficient ground I think, to the costs of executing the commission, and not beyond that.

*Agar v. Fairfax.*

In *Agar v. Fairfax* (c); Lord Chancellor Eldon followed the rule adopted in *Calmady v. Calmady* of giving no costs prior to the issue of the commission. The chancellor gave as a reason that he thought it just that each of the parties should bear the expense of making out his own title, but that the costs of issuing, executing and confirming the commission should be borne by the parties in proportion to the value of their respective interests, and there should be no costs of the subsequent proceedings.

Act of 1868.

In this state the law remained to the time of the passing of the Act of 1868; and it is easy to perceive how unequally the rule might work in many cases.

Lord Romilly, Master of the Rolls, at first thought that the new act had not effected any change in the old rule as to the incidence of costs; but he subsequently changed his opinion, and the usual practice now is to pay the costs out of the estate, so as to make the parties bear them rateably. It is now admitted that

there is absolute discretion in the judge to deal with the question of costs as may be just.

In *Landell v. Baker* (d), Lord Romilly said : *Landell v. Baker.*  
 “ I do not think the act was intended to alter the practice of the court with respect to costs, and each party must therefore bear his own costs up to the hearing.”

But in *Simpson v. Ritchie* (e), Lord Selborne *Simpson v. Ritchie.*  
 observed : “ Having regard to the 10th section of the act, it cannot be said that the court is bound by the old rule as to the costs of partition suits. It is impossible to lay down a general rule on the subject, and there may be cases in which the court, in the exercise of its discretion, will follow the old practice ; but in this case I think the costs ought to be paid out of the estate.”

In this case the plaintiffs were owners of a moiety of the estate, and the other moiety belonged to two separate owners.

The plaintiff, in exercise of the option given by the 9th section, had only made one of the co-owners a defendant by his bill, and on the hearing a decree had been made directing inquiries who were the parties interested. Those inquiries having been answered, the cause came on upon further consideration, the other co-owners having been served with notice of the proceedings. He

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(d) 6 Eq. 268.

(e) 16 Eq. 103.



suggested that no costs should be given to any party up to the hearing, but the other parties pointed out that if that were done, he would be put in a better position than the owner who had been selected as a defendant; thereupon Lord Selborne, Chancellor (sitting for the Master of the Rolls), decided as above stated.

*Osborne v.  
Osborne.*

In *Osborne v. Osborne* (*f*), Vice-Chancellor Malins declared that the costs of all parties of the suit were to be a lien on the proceeds of the sale.

*Miller v.  
Marriott.*

In *Miller v. Marriott* (*g*), Lord Romilly, notwithstanding his decision in *Landells v. Baker*, followed the Vice-Chancellor's decision in the last case, observing, "The plaintiff has one-fourth of the property, the defendants have the other three-fourths, and they get all the advantage of the plaintiff's bill and of the costs he has incurred, which are usually the greatest. The Vice-Chancellor Malins thought that under these circumstances the costs of all parties ought to come out of the estate, and I am disposed to follow him."

*Cannell v.  
Johnson.*  
The entire  
costs to be  
apportioned.

Again, in *Cannell v. Johnson* (*h*), Lord Romilly stated, "I am satisfied that, according to the practice, which I have followed on several previous occasions, the entire costs of a partition suit

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(*f*) 6 Eq. 338.

(*g*) 7 Eq. 1.

(*h*) 11 Eq. 11.

should be borne by the parties in proportion to their interests as declared by the decree, except where there are any special circumstances arising from the conduct of any of the parties which may lead the court to apportion the costs otherwise. In this case the plaintiff must pay one-fifth, and the defendant four-fifths, of the entire costs of the suit."

The rule stated in the last quoted case has since been followed, and may now be considered the settled practice of the court.

Where one of the defendants in a partition suit had leased his undivided share for 99 years, the costs of suit of the lessee, who was a necessary party to the proceedings, were ordered to be paid by his lessor (i). Costs of lessee of undivided share.

If this principle is to be observed, the rule would extend to incumbrancers and parties interested under settlements of undivided shares. Incumbrancers, &c.

The court has unfettered discretion conferred upon it by the statute in respect to the incidence of costs.

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(i) *Cornish v. Guest*, 2 Cox, 27.



## APPENDIX.

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31 HEN. 8, C. 1. A.D. 1539.

*For Joint Tenants and Tenants in Common.*

FORASMUCH as by the common laws of this realm divers of the king's subjects, being seised of manors, lands, tenements and hereditaments as joint tenants or as tenants in common with other of any estate of inheritance in their own rights or in the right of their wives, by purchase, descent or otherwise, and every of them so being joint tenants or tenants in common have like right, title, interest and possession in the same manors, lands, tenements and hereditaments for their parts or portions jointly or in common undividedly together with other, none of them by the law doth or may know their several parts or portions in the same, or that that is his or theirs, by itself undivided, and cannot by the laws of this realm otherwise occupy or take the profits of the same, or make any severance, division or partition thereof, without either of their mutual assents and consents, by reason whereof divers and many of them, being so jointly and undividedly seised of the said manors, lands, tenements and hereditaments, oftentimes of their perverse, covetous and malicious minds and wills against all right, justice, equity and good conscience, by strength and power not only cut and fallen down all the woods and trees growing upon the same, but also have extirped, subverted, pulled down and destroyed all the houses, edifices and buildings, meadows, pastures, commons and the whole commodities of the same, and have taken and converted them to their own uses and behoofs, to the open wrong and disherison

Several inconveniences ensuing by holding lands jointly or in common, being undivided.

and against the minds and wills of other holding the same manors, lands, tenements and hereditaments jointly or in common with them, and they have been always without assured remedy for the same :

Joint tenants and tenants in common are compellable to make partition by writ extended to joint tenants, &c., for life or years, by 32 Hen. 8, c. 32.

2. Be it therefore enacted by the king our most dread sovereign lord, and by the assent of the lords spiritual and temporal, and by the commons, in this present parliament assembled, that all joint tenants and tenants in common that now be, or hereafter shall be, of any estate or estates of inheritance in their own rights or in the right of their wives, of any manors, lands, tenements or hereditaments within this realm of England, Wales, or the marches of the same, shall and may be coacted and compelled, by virtue of this present act, to make partition between them of all such manors, lands, tenements and hereditaments as they now hold or hereafter shall hold as joint tenants or tenants in common by writ *de participatione faciendâ*, in that case to be devised in the king our sovereign lord's Court of Chancery, in like manner and form as coparceners by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law :

Every of the joint tenants and tenants in common shall have aid of the other.

3. Provided alway, and be it enacted, that every of the said joint tenants or tenants in common and their heirs, after such partition made, shall and may have aid of the other, or of their heirs, to the intent to dereign the warranty paramount and to recover for the rate as is used between coparceners after partition made by the order of the common law, any thing in this act contained to the contrary notwithstanding.

32 HEN. 8, c. 32. A.D. 1540.

*Joint Tenants for Term of Life or Years.*

Forasmuch as in the parliament begun at Westminster the twenty-eighth day of April and there continued till the twenty-eighth day of June, the thirty-first year of the king's most noble and victorious reign that now is, it was amongst other things there enacted and established, that all joint tenants and tenants in common that then were, or hereafter should be, of any estate or estates of inheritance in their own rights or in the right of their wives, of any manors, lands, tenements or hereditaments within this realm of England, Wales or marches of the same, shall and may be coacted and compelled by virtue of the said act to make partition between them of such manors, lands, tenements and hereditaments as they then held or hereafter should hold as joint tenants or tenants in common, as more at large appeareth by the said statute; and forasmuch as the said statute doth not extend to joint tenants and tenants in common for term of life or years, neither to joint tenants or tenants in common where one or some of them have but a particular estate for term of life or years, and the other have estate or estates of inheritance of and in any manors, lands, tenements and hereditaments:

Be it therefore enacted by the king our sovereign lord, and by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that all joint tenants and tenants in common and every of them which now hold or hereafter shall hold jointly or in common for term of life, year or years, or joint tenants or tenants in common where one or some of them have or shall have estate or estates for term of life or years, with the other that have or shall have estate or estates of inheritance or freehold in any manors, lands, tenements or hereditaments, shall and may be compellable from henceforth by writ of partition, to be pursued out of the

31 Hen. 8, c. 1.  
Joint tenants  
and tenants in  
common for  
lives or years  
shall make  
partition.

Joint tenants  
for life or  
years are com-  
pellable to  
make partition.

king's Court of Chancery upon his or their case or cases, to make severance and partition of all such manors, lands, tenements and hereditaments which they hold jointly or in common for term of life or lives, year or years, where one or some of them hold jointly or in common for term of life or years with other, or that have an estate or estates of inheritance of freehold:

Partition to be  
prejudicial to  
none but  
parties.

Provided alway, and be it enacted, that no such partition or severance hereafter to be made by force of this act, be, nor shall be, prejudicial or hurtful to any person or persons, their heirs or successors, other than such which be parties unto the said partition, their executors or assigns.

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4 ANNE, c. 16; 4 & 5 ANNE, c. 3. A.D. 1705.

*An Act for the Amendment of the Law, and the better  
Advancement of Justice.*

Proviso for  
actions of  
account by and  
between joint  
tenants, as  
bailiffs, &c.

Sect. 27. And be it enacted by the authority aforesaid, that from and after the said first day of Trinity Term, actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff and receiver, and also by one joint tenant and tenant in common, his executors and administrators, against the other as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common. And the auditors appointed by the court, where such action shall be depending, shall be and are hereby empowered to administer an oath and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be.

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7 ANNE, C. 18. A.D. 1708.

*An Act to preserve the Rights of Patrons to Advowsons.*

Forasmuch as the pleading in a *quare impedit* is found very difficult, whereby many patrons are either defeated of their right of presentation, or put to great charge and trouble to recover their right which is occasioned by the law as it now is: For remedy whereof, Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, and by the authority of the same, that no usurpation upon any avoidance in any church, vicarage or other ecclesiastical promotion shall displace the estate or interest of any person entitled to the advowson or patronage thereof, or turn it to a right, but he or she that would have had a right if no usurpation had been, may present or maintain his or her *quare impedit* upon the next or any other avoidance, if disturbed, notwithstanding such usurpation; and if coparceners or joint tenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church or vicarage or other ecclesiastical promotion, and a partition is or shall be made between them to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, and the other of the other moiety to present in the second turn; in like manner if there be three, four or more, every one shall be said to be seised of his or her part, and to present in his or her turn.

No usurpation shall displace the estate of the patron, but he may maintain a *quare impedit*. If coparceners, &c. be seised of an advowson, &c., and a partition is made to present by turns, each shall be seised of a separate estate to present accordingly.



4 &amp; 5 VICT. C. 35. A.D. 1841.

*An Act for the Commutation of certain Manorial Rights in Lands of Copyhold or Customary Tenure, &c.*

Courts of equity may decree a partition of lands of copyhold or customary tenure.

Sect. 85. And whereas it is expedient that facilities should be afforded by courts of equity to parties desirous of obtaining a partition of their lands of copyhold or customary tenure, but doubts are entertained whether by the practice of such courts the same can now be obtained: Be it enacted and declared, that from and after the passing of this act, it shall be lawful for any court of equity in any suit to be thereafter instituted therein for the partition of lands of copyhold or customary tenure, to make the like decree for ascertaining the rights of the respective parties to the suit in such lands, and for the issue of a commission for the partition of the same lands, and the allotment in severalty of the respective shares therein, as according to the practice of such court may now be made with respect to lands of freehold tenure.



## THE TRUSTEE ACT, 1850.

13 &amp; 14 VICT. C. 60.

*An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees.*

Interpretation of terms.

2. And whereas it is expedient to define the meaning in which certain words are hereafter used: It is declared that the several words hereinafter named are herein used and applied in the manner following respectively; (that is to say,)

The word "lands" shall extend to and include manors, messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

The word "stock" shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein :

The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity, in any lands :

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands :

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent :

The words "convey" and "conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an act passed in the fourth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and the substitution of more simple Modes of Assurance," and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands :

3 & 4 Will. 4,  
c. 74.

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "lord chancellor" shall mean as well the lord chancellor of Great Britain as any lord keeper or lords commissioners of the great seal for the time being :

The words "lord chancellor of Ireland" shall mean as well the lord chancellor of Ireland as any keeper or lords commissioners of the great seal of Ireland for the time being :

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage ; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person :

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo*.

The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs :

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an

interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent :

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a court of equity be deemed merely a security for money :

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

3. And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the lord chancellor, intrusted by virtue of the queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct ; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Lord chancellor may convey estates of lunatic trustees and mortgagees ;

4. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the lord chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said lord chancellor shall direct ; and the order shall have the same effect as if the trustee or mort-

may convey contingent rights.

gagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

Court of Chancery may convey estates of infant trustees and mortgagees.

7. And be it enacted, that where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

Contingent rights of infant trustees and mortgagees.

8. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust, or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

Court of Chancery may convey the estate of a trustee out of the jurisdiction of the court.

9. And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order vesting such lands in such person or persons in such manner, and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

Court may make order in cases where persons are seised of lands jointly with parties out of jurisdiction of court, &c.

10. And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such

manner, and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

11. And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust, shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Contingent  
rights of  
trustees.

12. And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

Court may  
make order in  
cases where  
persons are  
jointly entitled  
with others out  
of the jurisdic-  
tion of the  
court to a con-  
tingent right  
in lands.

13. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order, vesting such lands in such person or persons, in such manner, and for such estate, as the said court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When it is un-  
certain which  
of several trust-  
tees was the  
survivor.

When it is uncertain whether the last trustee be living or dead.

14. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner, and for such estate, as the said court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

When trustee dies without an heir.

15. And be it enacted, that when any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

Contingent right of unborn trustee.

16. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

Power to appoint a person to convey in certain cases.

20. And be it enacted, that in every case where the lord chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make

an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the lord chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the lord chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act.

21. And be it enacted, that as to any lands situated within the Duchy of Lancaster or the Counties Palatine of Lancaster or Durham, it shall be lawful for the court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster, or the Court of Chancery in the County Palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the court of the Duchy Chamber of Lancaster, the Court of Chancery in the County Palatine of Lancaster, or the Court of Chancery in the County Palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local courts to be an absent trustee or mortgagee within the meaning of this act.

As to lands in  
Lancaster and  
Durham.

28. And be it enacted, that whensoever, under any of the

Effect of an



order vesting copyhold lands or appointing any person to convey copyhold lands.

provisions of this act, an order shall be made either by the lord chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made, with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this act, an order shall be made, either by the lord chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor, and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

30. And be it enacted, that where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions

concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of this act, and thereupon it shall be lawful for the lord chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said court or the said lord chancellor might, under the provisions of this act, make concerning the estates, rights, and interests of trustees born or unborn.

37. And be it enacted, that an order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action, subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action, subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage.

Who may apply.

40. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the lord chancellor, intrusted as aforesaid, may, should he so think fit, present a petition in the first instance to the Court of Chancery, or to the lord chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said court, or the lord chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

Power to present petition in the first instance.

41. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said court or for

What may be done upon petition.

the said lord chancellor, should it be deemed necessary, to direct a reference to one of the masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said court or for the said lord chancellor to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said court or before the said lord chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

Court may dismiss petition, with or without costs.

42. And be it enacted, that upon the hearing of any such motion or petition, whether any certificate or report from a master shall have been obtained or not, it shall be lawful for the court, or the lord chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this act.

Power to make an order in a cause.

43. And be it enacted, that whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this act shall appear to such court to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this act.

Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

44. And be it enacted, that whenever any order shall be made under this act, either by the lord chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery, or cannot be found, or that it is uncertain which of several trustees, or which of

several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the lord chancellor, in-trusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: provided always, that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this act, when the same shall appear to have been improperly obtained.

48. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock or chose in action conveyed, assigned or transferred under this act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England in the name and with the privity of the accountant-general, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said court; and it shall be lawful for the said court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for

Money of infants and persons of unsound mind to be paid into court.

such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Court may make a decree in the absence of a trustee.

49. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery it shall be made to appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the court, and that he cannot be found, it shall be lawful for the said court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors or administrators, for or in respect of any estate, right or interest which such person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee as aforesaid.

Costs may be paid out of the estate.

51. And be it enacted, that the lord chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said lord chancellor or court shall think proper.

Commission concerning person of unsound mind.

52. And be it enacted, that upon any petition being presented under this act to the lord chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be

lawful for the said lord chancellor, should he so think fit, to direct that a commission in the nature of a writ *de lunatico inquirendo* shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission.

54. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations and colonies belonging to her Majesty (except Scotland). Powers of Court of Chancery to extend to property in the colonies.

55. And be it enacted, that the powers and authorities given by this act to the Court of Chancery in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland. Powers given to Court of Chancery may be exercised by that court in Ireland.

56. And be it enacted, that the powers and authorities given by this act to the lord chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations and colonies belonging to her Majesty (except Scotland and Ireland). Powers of Lord Chancellor in Lunacy to extend to property in the colonies.

57. And be it enacted, that the powers and authorities given by this act to the lord chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the lord chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland. Powers of Lord Chancellor in Lunacy may be exercised by Lord Chancellor of Ireland

## TRUSTEE EXTENSION ACT, 1852.

15 &amp; 16 VICT. c. 55.

*An Act to extend the Provisions of the Trustee Act, 1850.*

2. That sections numbered 17 and 18 in the Queen's printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly-authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the court shall direct, or releasing such contingent right in such manner as the court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.

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THE LEASES AND SALES OF SETTLED  
ESTATES ACT, 1856.

19 & 20 VICT. C. 120.

*An Act to facilitate Leases and Sales of Settled Estates.*

[29th July, 1856.]

23. All money to be received on any sale effected under the authority of this act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same shall be paid into the Bank of England or Ireland, as the case may be, to the account of the accountant-general of the Court of Chancery, ex parte the applicant in the matter of this act, and in either case such money shall be applied as the court shall from time to time direct to some one or more of the following purposes; (namely,)

Court may appoint trustees to receive and apply monies arising from sales.

The purchase or redemption of the land tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled.

24. The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without any application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Trustees may apply monies, in certain cases, without application to court.



Until money  
can be applied,  
to be invested,  
and dividends  
to be paid to  
parties entitled.

25. Until the money can be applied as aforesaid, the same shall be from time to time invested in exchequer bills, or in Three per Centum Consolidated Bank Annuities, as the court shall think fit; and the interest and dividends of such exchequer bills or bank annuities shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

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### THE PARTITION ACT, 1868.

31 & 32 VICT. c. 40.

*An Act to amend the Law relating to Partition.*

[25th June, 1868.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Short title.

1. This act may be cited as the Partition Act, 1868.

As to the term  
"the Court."

2. In this act the term "the court" means the Court of Chancery in England, the Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, within their respective jurisdictions.

Power to court  
to order sale  
instead of  
division.

3. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among

them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

4. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then, if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

Sale on application of certain proportion of parties interested.

5. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions.

As to purchase of share of party desiring sale.

6. On any sale under this act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase-money, or any part thereof, instead of paying the same, or as to any other matters, as to the court seem reasonable.

Authority for parties interested to bid.

7. Section thirty of the Trustee Act, 1850, shall extend Application of

- Trustee Act (13 & 14 Vict. c. 60). and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property.
- Application of proceeds of sale (19 & 20 Vict. c. 120). 8. Sections twenty-three to twenty-five (both inclusive) of the act of the session of the nineteenth and twentieth years of her Majesty's reign (chapter one hundred and twenty), "to facilitate leases and sales of settled estates," shall extend and apply to money to be received on any sale effected under the authority of this act.
- Parties to partition suits. 9. Any person who, if this act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the court to add to the decree or order.
- Costs in partition suits. 10. In a suit for partition the court may make such order as it thinks just respecting costs up to the time of the hearing.
- As to General Orders under this act (21 & 22 Vict. c. 27). 11. Sections nine, ten, and eleven of the Chancery Amendment Act, 1858, relative to the making of general orders, shall have effect as if they were repeated in this act, and in terms made applicable to the purposes thereof.
- Jurisdiction of county courts in partition. 12. In England the county courts shall have and exercise the like power and authority as the Court of Chancery in

suits for partition (including the power and authority conferred by this act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of the County Courts Act, 1865. (28 & 29 Vict. c. 99).



## THE PARTITION ACT, 1876.

39 &amp; 40 VICT. C. 17.

*An Act to amend the Partition Act, 1868.*

[27th June, 1876.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. This act may be cited as the Partition Act, 1876, and Short title. shall be read as one with the Partition Act, 1868.

2. This act shall apply to actions pending at the time of the passing of this act as well as to actions commenced after the passing thereof, and the term "action" includes a suit, and the term "judgment" includes decree or order. Application of act.

3. Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service Power to dispense with service of notice of decree or order in special cases.

on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

Proceedings  
where service  
is dispensed  
with.

4. Where an order is made under this act dispensing with service of notice on any person or class of persons, and property is sold by order of the court, the following provisions shall have effect:

- (1.) The proceeds of sale shall be paid into court to abide the further order of the court:
- (2.) The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:
- (3.) The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended

distribution, and the time within which a claim to participate in the proceeds must be made :

- (4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons :

- (5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with such reservations (if any) as to the court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any *primâ facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

5. Where in an action for partition two or more sales are made, if any person who has by virtue of this act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the
- Provision for  
case of suc-  
cessive sales in  
same action.

proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

Request by married woman, infant, or person under disability.

6. In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit.

Action for partition to include action for sale and distribution of the proceeds.

7. For the purposes of the Partition Act, 1868, and of this act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

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*"Now for the Laws of England (if I shall speak my opinion of them without partiality either to my profession or country), for the matter and nature of them, I hold them wise, just and moderate laws: they give to God, they give to Cæsar, they give to the subject what appertaineth. It is true they are as mixt as our language, compounded of British, Saxon, Danish, Norman customs. And surely as our language is thereby so much the richer, so our laws are likewise by that mixture the more complete."—LORD BACON.*

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